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SUPREME COURT, U.S.

CASE NO. 85-5319

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WILLIE JASPER DARDEN,
Petitioner,
v.
LOUIE L. WAINWRIGHT
as Secretary, Department of
Corrections, State of Florida
Respondent.

On Writ of Certiorari to the Eleventh Circuit

APPLICATION FOR STAY OF EXECUTION
PENDING REVIEW OF
PETITION FOR A WRIT OF CERTIORARI

To: THE HONORABLE LEWIS F. POWELL, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit

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THIS IS A FIRST WRIT CASE

The Applicant, WILLIE JASPER DARDEN, is a condemned prisoner in the State of Florida whose sentence of death is scheduled to be executed at 7:00 a.m., Wednesday, 04 September 1985. Through undersigned counsel, Applicant invokes the jurisdiction of this Court to stay Petitioner's execution pending the filing and disposition of a Petition for Writ of Certiorari. A stay is necessary for the applicant to be given the opportunity to present to the Court substantial and important constitutional questions worthy of review as to his conviction and sentence.

At the time of filing of the instant application, a stay of execution previously entered by the United States Court of Appeals for the Eleventh Circuit is set to expire, at 9:00 a.m., 03 September 1985, one day before the scheduled execution. Mandate is to issue contemporaneously. The Court has the authority to issue the requested stay pursuant to 28 U.S.C.

2101(f), 28 U.S.C. 1651, and Rules 44 and 51 of the Rules of the Supreme Court of the United States.

The following is stated in support of the application:

I. PROCEDURAL POSTURE OF THE CASE

1. DARDEN was indicted on 23 September 1973 for (R 21-22) one count of first degree murder, robbery and assault with intent to commit murder, to which he plead not guilty. Trial was had before a jury which convicted him on 18 January 1974, and immediately thereafter the jury recommended death. The sentencing judge found three aggravating circumstances, two involving status (under sentence of imprisonment/prior conviction) and two mitigating circumstances, followed the jury recommendation and sentenced Petitioner to death.

2. The Supreme Court of Florida affirmed the conviction and sentence on 18 February 1976, in Darden v. State, 329 So.2d 287 (Fla. 1976). Rehearing was denied on 04 April 1976. A petition for writ of certiorari was filed in this Court, which was granted on 01 November 1976, 429 U.S. 917 (1976). The Court later restricted certiorari to the first of three questions, the issue of improper prosecutorial closing argument, 10 January 1977. After oral argument, the petition was dismissed as improvidently granted on 19 April 1977, 430 U.S. 704. See footnote 6, infra.

3. On 18 May 1979, the Governor of the State of Florida signed a first death warrant on WILLIE DARDEN. He was scheduled to be executed on 23 May 1979. On or about 21 May 1979, the Defendant filed a Motion for Post Conviction Relief, pursuant to Fla.R.Crim.P. 3.850 in the Circuit Court of the Fifth Judicial Circuit. Said motion was denied by the same presiding trial Judge John Dewell on 21 May 1979. The Florida Supreme Court affirmed the trial court's denial of Defendant's 3.850 motion without briefing and denied a stay of execution the same date, 372 So.2d 436 (Fla. 1979). Rehearing was denied on 30 May 1979.

4. On 22 May 1979, pursuant to habeas corpus application, the United States District Court for the Middle District of Florida, Judge William Terrell Hodges, stayed Mr. DARDEN's execution. After an evidentiary hearing, United States Magistrate Paul Game, Jr., Middle District of Florida, issued a Report and Recommendation dated 10 April 1981 recommending that the requested relief be granted (Appendix 001). However,

on review and after a hearing on objections to the report and recommendation of the magistrate the habeas corpus petition was denied by the district court, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981).

5. The denial of relief by the district court was appealed to the United States Court of Appeals for the Eleventh Circuit. The decision was affirmed 2-1 in a panel decision issued on 14 February 1983, and corrected 09 March 1983, 669 F.2d 1031 (11th Cir. 1983). Petition for rehearing en banc was filed in the Eleventh Circuit, and 01 July 1983 the Court by operation of law affirmed the panel decision by a vote of 6-6, 708 F.2d 640 (11th Cir. 1983). Petition for rehearing en banc was filed in the Eleventh Circuit on or about 22 July 1983. On 05 August 1983, while rehearing was pending, the Governor of the State of Florida signed a second death warrant, and Petitioner was scheduled to be executed on 07 September 1983. On 01 September 1983, the Eleventh Circuit, on its own motion, vacated the earlier panel decision and the en banc affirmance, granted en banc reconsideration, and stayed Petitioner's execution, 715 F.2d 502 (11th Cir. 1983).

6. The Eleventh Circuit, again by en banc decision, voted 7-5 to grant habeas relief to Petitioner, on Witherspoon grounds, 725 F.2d 1526 (11th Cir. 1984) on 22 February 1984. The State filed a petition for writ of certiorari to this Court, after a stay of mandate.

7. On 19 February 1985, the United States Supreme Court granted certiorari, in 105 S.Ct. 1158, vacated the Eleventh Circuit's 7-5 en banc decision, and remanded the case for further consideration in light of Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1984). On remand, the Eleventh Circuit affirmed the District Court's original denial of habeas corpus relief, in Darden v. Wainwright, No. 81-5590 (11th Cir. July 23, 1985) (en banc) [J. J. Clark and Johnson, dissenting.] (Appendix 039).

8. Again prior to expiration of time for rehearing, the Governor of the State of Florida signed a third death warrant on 08 August 1985. Petitioner's execution is scheduled for 04 September 1985, at 7:00 a.m. The stay entered 01 September 1983 by the Eleventh Circuit was still in effect at the time the death warrant was signed. Petition for rehearing was sought in the Eleventh Circuit on 16 August 1985, and Supplemental Petition for rehearing was filed on 20 August 1985. Also on 16 August 1985

DARDEN moved to extend and enforce the stay of execution. On 27 August 1985, the Petition for Rehearing was denied, with dissent. The Eleventh Circuit acknowledged that the State of Florida had set an execution date while a stay was in effect, and chose to leave the stay in effect until twenty-four hours before Petitioner's scheduled execution. "At 9:00 a.m., Tuesday, September 3, 1985, the mandate will issue, and the stay of execution heretofore and presently in effect shall terminate." (Appendix 064).

II. A STAY OF EXECUTION SHOULD BE GRANTED TO AFFORD THIS COURT THE OPPORTUNITY FOR AN ORDERLY AND DELIBERATE REVIEW OF THE PETITION FOR WRIT OF CERTIORARI

Sound and reasonable issues exist upon which this Court should grant WILLIE JASPER DARDEN certiorari review in this case. The unilateral action of the executive branch of the State of Florida has robbed Petitioner, and this Court, of the unhurried and deliberative process by which these substantial certiorari issues should be considered in this initial petition for federal habeas corpus relief. Significantly, the state warranted Mr. DARDEN to be executed during the pendency of a stay order. See September 1, 1983 Stay Order, App. at 068; see also App. 064. By the state's action, Mr. DARDEN's worthy certiorari petition appears as a last-minute, last-ditch attempt by a condemned inmate to forestall his execution, when clearly such is not the case.

Mr. DARDEN has vigorously and conscientiously pursued relief from his conviction and death sentence, based on a crime for which he has never wavered in protesting his innocence. The resulting conviction and sentence have troubled every Court which has reviewed his claims. Two justices of the Florida Supreme Court dissented from the affirmance of Mr. DARDEN's conviction because of the reprehensible arguments of the prosecutor. Darden v. State, 329 So.2d 287, 289 (Fla. 1976). This Court initially granted certiorari, then dismissed it as improvidently granted. See footnote 6, infra. The federal magistrate recommended that the conviction be reversed because of those same arguments (Appendix 01).

A split panel of the Eleventh Circuit denied relief while holding that the state's closing arguments were riddled with "tasteless and unprofessional" diatribes which "even the state candidly asserted no one has ever weakly suggested were anything but improper" and "would have been

reversible error in appeal from a Federal criminal case...." Darden v. Wainwright, 699 F.2d 1031, 1035 (11th Cir. 1983), quoting 513 F.Supp. at 952. The Eleventh Circuit then divided evenly, six (6) to six (6), 708 F 2d 648. Mr. DARDEN's death sentence was then vacated by the en banc Court on his Witherspoon claim, Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984). That decision was vacated and remanded for reconsideration in light of Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 1984. Wainwright v. Darden, 105 S.Ct. 1158 (1985). On remand, the en banc court reversed its decision in light of Witt, two Judges issued strong dissents on the Witherspoon and prosecutorial misconduct claims, and Judge Clark adhered to his belief that the prosecutor's arguments rendered the sentence proceeding fundamentally unfair, particularly in light of the tenuous evidence of Mr. DARDEN's guilt. Darden v. Wainwright, No. 81-5550 (11th Cir. Jul. 23, 1985) (en banc), (Clark dissenting), (Appendix 039).

It is against this backdrop of repeatedly expressed doubt of the validity of Petitioner's conviction and sentence by numerous jurists that Mr. DARDEN's forthcoming certiorari petition should be judged. To reiterate, the petition is from DARDEN's first federal habeas claims, a procedural posture recognized by the Court as significant in determining whether a stay should be granted to enable the Court to fully consider substantial constitutional claims. Barefoot v. Estelle, ___ U.S. ___, ___, 103 S.Ct. 3383, 3393-5, 75 L.Ed.2d ___ (1983). Mr. DARDEN recognizes certiorari from denial of an initial habeas petition does not require a stay be granted automatically as does certiorari from the direct appeal of a sentence of death. McDonald v. Missouri, ___ U.S. ___, 104 S.Ct. 567 (1984) (Powell, Circuit Justice). However, the fact Mr. DARDEN was in the midst of litigating his claim and had already been granted a stay when the state attempted to foreclose his opportunity for certiorari review is unquestionably a powerful circumstance favoring this court's grant of a stay pending the filing and disposition of certiorari. See Shaw v. Martin, 613 F.2d 487, (4th Cir. 1980), at 491, (Stay of execution granted so death-sentenced petitioner could pursue post-conviction "avenues of review so long and so well established that they must be counted among the basic 'protections' with which the judicial system has 'surrounded' all persons

convicted of crime." Id., quoting Evans v. Bennett, 440 U.S. 1301, 1303 (1979) (Rehnquist, J.)).

A stay of execution is authorized by 28 U.S.C. Section 2101(f) and 28 U.S.C. 1651 and Rule 44, Rules of the United States Supreme Court. The standard governing the issuance of a stay is settled. "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficient meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. ___, 103 S.Ct. at 3395 (1983) (citations omitted), accord Fare v. Michael C., 439 U.S. 1310 (1978) (Rehnquist, Circuit Justice). While the burden of persuasion as to these issues is on Petitioner, refusal of the Court of Appeals to grant the stay is no bar to this Court's grant of the stay. Heckler v. Lopez, 104 S.Ct. 10 (1984) (Rehnquist, Circuit Justice).

The balance of equities is clearly in favor of Mr. DARDEN since he will suffer the irreparable injury of execution if no stay is granted. See Gregg v. Georgia, 428 U.S. 1301 (1976) (Powell, Circuit Justice) (granting stay of mandate pending rehearing, holding, "If the executions in these cases were carried out before the petition for rehearing could be acted on by the court, the harm to Petitioner would obviously be irreparable."). The state's interest in denial of a stay is slight. Gregg, 428 U.S. at 1301. Mr. DARDEN has been in the custody of the State of Florida for twelve years, and a delay for the purpose of filing a certioruri petition injures no state interest. This is particularly so where the state acted in direct contravention of a stay under already in effect when it scheduled Mr. DARDEN's execution.

The information and materials necessary to make a careful assessment of the merits of the issues to be presented whereby the Court can reliably determine whether plenary review and a stay are warranted, Barefoot v. Estelle supra, 103 S.Ct. at 3395, are set forth below and separately filed in Petitioner's Appendix, as much as is practically possible under the state imposed rush to judgment.

III. BASIS FOR STAY OF EXECUTION

1.

THE PROSECUTOR'S CLOSING ARGUMENTS CREATED THE UNACCEPTABLE RISK THAT THE DEATH PENALTY MAY HAVE BEEN METED OUT ARBITRARILY, AND THE ELEVENTH CIRCUIT'S RESOLUTION OF THE ISSUE WAS INCORRECT AND IN CONFLICT WITH THIS COURT'S PRECEDENT

Petitioner's guilt of first-degree murder was a close jury question: The sole evidence of guilt was cross racial identifications.[1] The prosecutor's closing arguments came immediately after Petitioner had, in the words of the trial judge, "emotionally, and with what appeared on its face to be sincerity, proclaimed his innocence"[2] before the jury. It was

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[1] "The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eye witness testimony of the victims. All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony." Darden v. Wainwright, No. 79-566 Civ.T-H, opinion at 22 (M.D. Fla. April 10, 1981) (Magistrate's Report and Recommendation) (Appendix at 22), recommendation that writ issue based on prosecutorial misconduct rejected by district court, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981).

[2] The trial judge's sentencing order is reproduced in the Appendix at page 70. The court found that Petitioner's testimony and statements to the jury, and its apparent sincerity, was a mitigating circumstance. Cf. Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981) modified 677 F.2d 20, cert. denied, 459 U.S. 882 (1982):

> "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists...[T]he juror [or judge] entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death."

See also Heiney v. Florida, 105 S.Ct. 303,304 (1984) (Marshall and Brennan, J.J., dissenting from denial of certiorari on direct appeal):

> "This Court in Lockett and then more decisively in Eddings, held that any aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational — indeed, there is nothing novel — about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death, is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

in these guilt/innocence arguments that the state demanded the death penalty.[3]

The closing arguments were outrageous. They have been condemned by Respondent, and by every jurist who has examined them. Every court and judge (except the trial judge) has condemned the means, but no court majority has condemned the end -- conviction.[4] No majority of any court has directly examined the Eighth Amendment prejudice arising from the arguments, and the unreliability injected into the sensitive sentencing balancing process via the unprofessional and inflammatory prosecutor comments.[5]

Petitioner asks this Court to examine the arguments and determine whether Petitioner's life should be extinguished before he is provided the opportunity to present a petition for writ of certiorari to this Court, in which he will seek a determination of whether the effect of the argument on sentencing has been properly resolved. This request takes the following form in this section: (1) Petitioner will reproduce relevant parts of the arguments; (2) Petitioner will show that the arguments have been universally condemned; (3) Petitioner will outline the conflict requiring certiorari review; and (4) Petitioner will demonstrate that the arguments were

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[3]In the guilt/innocence argument "he was also making in effect, his principal argument in support of the dealth penalty." Darden v. Wainwright, 513 F.Supp. 947, 953 (M.D. Fla. 1981). Prosecutors' closing argument guilt/innocence ran for 45 pages of trial transcript. "[T]he prosecution made its sentencing argument at the guilt/innocence phase." Darden v. Wainwright, No. 81-5590 slip.op. at 1, n2 (11th Cir. August 27, 1985) (Clark, J., dissenting from denial of Petition for Rehearing) Closing argument at sentencing covered one page of transcript. 513 F.Supp. at 953.

[4]Many judges have been concerned about the effect of the closing argument on the jury's determination of guilt. Four judges would reverse the conviction, Darden v. State, 329 So.2d 287, 291, (Fla. 1976) (Sundberg, J. and England J., dissenting); Darden v. Wainwright, No. 79-566 Civ. T.-H (M.D.Fla. April 10, 1981) (Magistrate's Report and Recommendation) (See Appendix at 1); Darden v. Wainwright, 699 F.2d 1031, 1040 (11th Cir. 1983) (Clark, J., dissenting). At least four members of this court believed in 1976 that the prosecutorial argument was sufficiently troubling to vote to grant petitioner's writ of certiorari to the Supreme Court of Florida. See footnote 6, infra.

[5]Judge Clark, Eleventh Circuit Court of Appeals, is the only jurist who has explicitely examined the effect of the arguments on sentencing. He has thrice concluded that the arugments prejudicially infected the sentencing process. 699 F.2d at 1040; Darden v. Wainwright, No. 81-5590, slip.op. at 15, Appendix at 59; Darden v. Wainwright, N. 81-5590, slip.op, August 27, 1985, opinion dissenting from denial of Petition for Rehearing. See Appendix at 61.

prejudicial at sentencing, under any judicially accepted test for prejudice. A stay should be granted on this basis alone. However, Petitioner will further demonstrate that the court below applied at least the incorrect test for prejudice, and at most did not examine the issue of sentencing prejudice at all. Caldwell v. Mississippi requires that circuit courts at least examine the issue of prejudice vis-a-vis closing arguments, and the Caldwell test for prejudice must be applied. Neither an examination nor an application of Caldwell occurred.[6]

A. Outrageous Argument

The words require little comment:

> "I wish [the victim] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see [Willie Darden] sitting here with no face, blown away by a shotgun.... I wish someone had walked in the back door and blown his head off at that point. But he is lucky, the public unlucky, people are unlucky, it didn't happen."

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[6]This Court granted Mr. Darden's Petition for Writ of Certiorari to the Supreme Court of Florida in 1976, Darden v. Florida, 428 U.S. 917 (1976), and subsquently limited review to "whether the prosecution's summation to the jury in the circumstances of this case deprived the petitioner of due process of law." Darden v. Florida, 429 U.S. 1050 (1977). After briefing and oral argument, this Court dismissed the writ as having been improvidently granted, without comment. Darden v. Florida 439 U.S. 704 (1977).

Petitioner presented the prosecutorial argument to the federal district court in his petition, and the court ruled on the claim on its merits, correctly noting that this Court's dissmissal was not a prior federal adjudication. Darden v. Wainwright, 513 F.Supp. 947, 950 (M.D.Fla. 1981). A dismissal of writ of certiorari as improvidently granted may, however, indicate this Court's decision that there is no federal question involved, Benz v. New York State Thruway Authority, 369 U.S. 147 (1961), or that no federal question was presented to the state court. Newsome v. Smyth, 365 U.S. 604 (1961).

The state argued both these points in its brief before the Court in 1977. First, the state argued that the closing argument had not been "federalized" because it had been presented and argued in state court as a matter of state law. Brief of Respondent, pages 11-14. Second, Respondent argued that there was insufficient objection at trial, so the issue was not presented at all. Id., page 14-25.

To the extent these matters contributed to dismissal, they are no longer in contention. The federal claim has been presented on federal constitutional grounds and ruled upon on the merits without any finding of procedural bar. Darden v. Wainwright, 699 F.2d 1031, 1033-1037 (11th Cir. 1983). This Court frequently awaits the percolation and ripening of issues in the state and federal courts before granting or determining petitions for certiorari. See McCray v. New York, 103 S.Ct. 2438, 2439, (1983). ("[I]t is a sound exercise of discretion for the Court to allow the various states to serve as labortories in which the issue receives further study before it is addressed by this Court.") (Stevens, J., opinion respecting the denial of petition for writ of certiorari.) The procedural problems have

(Footnote Continued)

(R. 758-59)(emphasis added).[7] The state repeatedly expressed the wish that Petitioner had died (or would die) a violent death. Prosecutor McDaniel returned to this theme when he described the four times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Petitioner] didn't get a chance to use it. I wish he had used it on himself." (R. 775). He made a similar comment in describing an automobile accident Petitioner had: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (R. 775). Finally, while discussing the allegation that Appellant had shaved between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat." (R. 775).

In discussing the fact that Petitioner had been on furlough from prison at the time of the offense, the state argued:

> "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash."

(R. 750). The state then begged for capital punishment by condemning the correctional system: "The second part of the trial I will request that you impose the death penalty. I will ask you to advise the court to give him death. That's the only way I know he is not going to get out in the public. It's the only way I know. It's the only way I can be sure of it. It's the only way anybody can be sure of it now...." (R. 753).

> As far as I am concerned...this animal was on the public for one reason. Because the Division of Corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (R. 749).

> I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would

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(Footnote Continued)
disappeared, and the substantive issue has ripened, in light of Caldwell v. Mississippi.

[7] While superfluous, Petitioner notes that the American Bar Association's Standing Committee on Standards for Criminal Justice "has promulgated useful guidelines," United States v. Young, 470 U.S. ___, 84 L.Ed 2d 1,8 (1985), for proper restriction on prosecutor comments. The above argument violently violates the most axiomatic restriction: "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." ABA Standards for Criminal Justice 3-5.8 (c) (2nd Ed. 1980) (hereinafter ABA Standards) See also Caldwell v. Mississippi, 105 S.Ct. 2633, 2642, n.6 (1985).

> have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (R. 749-50).
>
> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's office, but he and his keepers, the Division of Corrections." (R.765).

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you." (R. 781).[8]

The personal beliefs and opinions of the prosecutors permeated the arguments. The first prosecutor's argument by Mr. White, concluded with:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. (R. 748).[9]

Both of the state's closing arguments contained such statements of personal belief and opinion.

These short excerpts from the closing arguments demonstrate that there were not "a few brief [improper] sentences in the prosecutor's long . . . closing argument, Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974), but rather a driving diabolical diatribe that was "quite focused, unambiguous and strong." Caldwell, 105 S.Ct. 2633. The above-quoted arguments are merely illustrations of the prosecutors' outrageous misconduct.[10] Petitioner will show the prejudice from the arguments in section 1, B infra, and will there discuss additional improper prosecutor arguments.

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[8] The ABA Standards are again instructive: "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequence of the jury's verdict." ABA Standards 3-5.8(d).

[9] Expressions of personal opinion are forbidden. "Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." ABA Standards 3.89, see also Young, 84 L.Ed.2d 1, n.5.

[10] "Minor aberrations in a prolonged trial may be harmless," United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940), but pronounced (Footnote Continued)

B. Universally Condemned But So Far Ratified Arguments

Every court that has examined the prosecutor's arguments has condemned them. The state has wisely yielded: "No one has ever really suggested that McDaniel's closing remarks were anything but improper. . ." Respondent's Supplemental Answer, P. 12, quoted in Magistrate's Report and Recommendation, Appendix at 9. The following court comments illustrate that the arguments were fundamentally flawed.

The district court characterized the argument as a "tirade" containing "blatant expression of a personal opinion" and "a series of utterly tasteless and repulsive remarks" 513 F.Supp. at 953, 955:

> "Anyone attempting a text book illustration of a violation of the Code of Professional responsibility, Canon 7, EC 7-24 and DR 7-106(c)(4) could not possibly improve upon [the prosecutor's] example."

513 F. Supp at 955.[11] The majority panel decision in 1983, which is the en banc court's opinion,[12] similarly condemned the arguments "as tasteless and unprofessional," which "contained personal opinions," and "would have been reversible error on appeal from a federal criminal case." 699 F. 2d. 1031, 1035-36. Like the district court, however, the majority opinion concluded (without discussing the Eighth Amendment) that the arguments were harmless.[13]

C. Question for Certiorari--Whether the Eleventh Circuit is Bound by Caldwell

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(Footnote Continued)
and persistent misconduct is prejudicial. Berger v. United States, 295 U.S. 78 (1935).

[11] The court was specifically referring to the comment that the prosecutor was "convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer...I will be convinced of that the rest of my life."

[12] The Eleventh Circuit granted en banc consideration of the 2-1, 1983, panel decision, but then only discussed the Witherspoon issue. The prosecutorial misconduct issue was not addressed, as the court "conclude[d] that the panel's evaluation of these issues was correct and reinstate[d] the relevant portion of the panel's opinion, 699 F.2d at 1033-37." 725 F.2d 1526, 1532. The court found Witherspoon error, and the prosecutorial issue received short shrift. This Court granted certiorari and vacated the Witherspoon reversal in light of Witt. The Witherspoon/Witt issue was the only issued addressed in the 10-2 en banc decision upon remand.

[13] Even the majority opinion in the Florida Supreme Court recognized that "the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility..." 329 So.2d at 290.

This case presents a question of fundamental importance to the proper administration of the death penalty in Florida, Georgia, Alabama, and throughout the country. More importantly, the case involves whether Mr. Darden has received any, much less correct, treatment of his claim that the prosecutors' arguments destroyed the possibility of a reliable determination of sentence in his specific case.

The standards for analysis of whether constitutional error is, or can be, harmless in criminal proceedings has received the fine-tuned attention of this Court since the 2-1 panel decision in this case. See, e.g., United States v. Bagley, 105 S.Ct. 3375 (1985); Strickland v. Washington, 104 S.Ct. 2052 (1984). The effect of prosecutions misconduct in a sentencing case was addressed just ten weeks ago in Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), and the issue of improper prosecution argument in a non-capital case was addressed in United States v. Young, 105 S.Ct. 1038 (1984).

The Eleventh Circuit is in turmoil over whether its en banc decisions in Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985), Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985), Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) and Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), comport with the requirements of Caldwell. The Brooks line of cases barely predates Caldwell, and this Court will ultimately receive timely and unhurried certiorari petitions from petitioners in those cases. Petitioner here, however, must present a hastily drawn prayer for stay, and attempt to presage this Court's future determination (in Brooks and companion cases) of the propriety of the Eleventh Circuit's analysis.

The substantive conflict between Caldwell and Brooks is readily apparent: Caldwell requires resentencing after prosecutorial misconduct, unless the state demonstrates the argument "had no effect on the sentencing decision," 105 S. Ct. 2646; Brooks requires resentencing only if there is "a reasonable probability that, but for those arguments, the death penalty would not have been given." 762 F.2d. at 1413. The Brooks adoption and application of a Strickland v. Washington[14] prejudice standard is at odds

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[14]The Brooks court decided that Strickland v. Washington, 104 S.Ct. (Footnote Continued)

with Caldwell: the court admitted in Brooks that "[a]lthough we cannot conclude that these few improper remarks had no prejudicial effect on the jury, we are satisfied that the prejudice was not severe." Brooks, 762 f.2d. at 1415. If it cannot be said that there was "no prejudicial effect," the Eighth Amendment requires resentencing. Caldwell.

The conflict arose in this manner. On May 31, 1985, the Eleventh Circuit released its en banc decisions in Brooks, Drake, (W.B.), Tucker and (R) Tucker. Brooks was the lead case, and the Strickland prejudice test adopted controlled all four cases. This Court decided Caldwell 11 days later, recognizing that Eighth Amendment considerations prevent the state from creating an unacceptable risk that '"the death penalty may [have been] meted out arbitrarily or capriciously' or through 'whim or mistake.'" 105 S. Ct. at 2647 (O'Connor, J., concurring) (quoting California v. Ramos, 463 U.S. 992, 999 (1983). Petitions for rehearing were subsequently filed in (W.B.) Tucker and Brooks, and those petitions urged the en banc court to reconsider in light of Caldwell.

Rehearing was denied. However, three members of the en banc court dissented from denial of rehearing in both cases. In identical language in both dissents, the judge's stressed that "[t]he majority's use of the Strickland v. Washington, _____ U.S. _____, 104 S. Ct. 2052, 80 L.Ed. 7d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different) is in direct conflict with the recently decided Supreme Court case of Caldwell v. Mississippi, 53 Ct.S. L.W. 4743 (June 11, 1985)." Brooks v. Kemp, No. 83-8028 (11th Circuit, July 23, 1985) (Clark, Krawitch, and Johnson, J.J., dissenting from denial of Petition for Rehearing) (photocopy contained in Appendix at 72, filed herewith); W.B. Tucker vs. Kemp, No. 83-8137 (11th Circuit July 23, 1985) (Clark, Kravitz, and Johnson, J.J.,

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(Footnote Continued)
2052 (1984) provided the proper prejudice standard when deciding whether "fundamental fairness" under Donnelly v. DeChristoforo, 416 U.S. 637 (1974), requires reversal of a capital sentence possibly tainted by prosecutorial misconduct. Thus, a Petition under Donnelly/Strickland must prove that there is a reasonable probability that "but for those arguments, the death penalty would not have been given." 762 F.2d at 1413. The Brooks standard was used to deny relief in Brooks, and the companion cases.

dissenting from denial of Petition for Rehearing) (photocopy contained in Appendix at 76, filed herewith).

On August 6, 1985, the conflict grew. In Bowen v. Kemp, No. 84-8327 (11th Cir. 1985) (photocopy contained in Appendix at 79), a panel of the Eleventh Circuit again split on the Caldwell/Brooks issues. The two judge majority discussed a prosecutorial misconduct issue in pure Brooks/Strickland language, without even acknowledging the existence of this Court's Caldwell decision. The dissent applied Caldwell. ("Because the recent Supreme Court decision rejects the 'prejudice' test adopted in Brooks, I dissent...." Bowen v. Kemp, No. 84-0327 (11th Cir. August 6, 1985) (Johnson, J., dissenting) (see Appendix at 118).

The Eleventh Circuit decided Mr. Darden's case July 23, 1985. The majority opinion addressed only the Witherspoon/Witt issue. The 1983 panel 2-1 decision, which did address the prosecutional argument issue, is thus the Eleventh Circuit's only opinion on the prejudicial argument in Mr. Darden's case, and how prejudice is to be analyzed. 513 F. Supp. 947. In light of the substantial judicial activity in this court, Caldwell, Young, Strickland, and in the Eleventh Circuit, Brooks, with regard to the proper prejudice standard, Petitioner requested rehearing on the closing argument issue. The following order was entered:

> "At the request of one of the members of the en banc court, the court has been polled on the petition for rehearing addressed to the en banc court. Less than a majority of the judges in regular active service have voted in favor of the petition. The petition for rehearing is, therefore, denied."

Darden v. Wainwright, No. 81-5590 (11th Cir. August 27, 1985) (see Appendix at 13). In dissent, Judge Clark noted that "it would seem that the evidence here is weaker than in any of the four cases recently decided by the en banc court. The argument is as egregious as any." Id. Rehearing was required by Judge Clark "to clarify the discrepancy between the language of the en banc court in Brooks and that of the Supreme Court in Caldwell. Using either [prejudice standard], however, Darden is entitled to relief." Appendix at 65.

Thus, Petitioner comes before this Court on a first writ request for stay so as to be afforded the opportunity to prepare and present a petition for writ of certiorari addressing a question of profound significance about which reasonable jurists have consistently disagreed. The instant tension

is between Caldwell and Brooks, but even before the Caldwell decision, the courts that addressed Petitioner's claim split over the issue of prejudice from the closing argument herein.

Petitioner would like the opportunity to demonstrate that he can prevail under any prejudice standard, but that the State of Florida has scheduled his death before the rules of this Court require his application for certiorari to be filed. Thus, he will present his truncated and hurried demonstration here, to save his life, rather than when he should be allowed to, in a proper, judicious setting.

D. Question for Certiorari--Whether the Prosecutor's Closing Arguments Were Prejudicial at Sentencing.

The prejudice to Petitioner can only be evaluated upon a complete analysis of the facts of the case. The magistrate below, the dissent in the 2-1 panel decision, and two members of the Florida Supreme Court believed the evidence was sufficiently weak for the prejudicial closing argument to have provided the difference between guilt and innocence.

The potential for prejudice was great.

> In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was prejudiced against Darden by the argument. The state has failed to demonstrate, beyond a reasonable doubt, that the prosecutor's comments did not contribute to Darden's convictions.

Magistrate Report and Recommendation; App., p. 22-23.

1. Facts Upon Which Conviction and Sentence Were Based

a. Testimonial Facts

> "The testimony is going to show I think very shortly when the trial starts the victims in this case were white and, of course, Mr. Darden, the defendant, is black. Can each of you tell me that you can try Mr. Darden as if he was white?"
>
> [C]an you look at this defendant and assure me that you can try him as if he is white? Because the victims will be white. Can you look at the defendant and even though he is black, can you try him as if he was white?

(R. 57; 115: State's voir dire).

The state's transparent benevolence during the early stages of Petitioner's trial was soon replaced by explicit mean spiritedness: "He

shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash"; "I wish that I could see [Appellant] sitting here with no face, blown away by a shotgun. . . ." R. 750, 758-59 (closing argument). The majority of the Florida Supreme Court believed that "overwhelming eyewitness and circumstantial evidence" supported the guilt determination, blunting the prejudicial impact of the prosecutors' closing arguments. The dissent disagreed, being unconvinced that the argument "did not contribute to . . .defendant's conviction." Darden, 329 So.2d at 295.

The Florida Supreme Court majority recited the "facts" underlying Petitioner's conviction:

> Carl's Furniture Store in Lakeland, Florida, was robbed on September 8, 1973. During the course of the robbery, the proprietor, Carl Turman, was shot and killed and a neighbor boy, Phillip Arnold, was wounded. Soon afterwards, the Appellant, Willie J. Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he was driving and smashed into a telephone pole some three miles from the site of the murder, assault and robbery. After returning to his girl friend's house in Tampa that night, the Appellant was arrested on a traffic charge, leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery and assault with intent to commit rape....
>
> Both before and during trial, Mr. Darden was identified as the guilty party by Phillip Arnold and by Mrs. Turman, the decedent's wife, who was present and assaulted during the commission of the robbery and murder.

Id. at 288 (emphasis added).

The eyewitness identifications at trial were indeed damaging to Petitioner, but they were in fact anything but conclusive. The identifications occurred in the following manner. First, with respect to Mrs. Turman, she told officers immediately after the offense that "she could not remember what the subject looked like or what he was wearing." See police report, Appendix page 132; see also R. 232, 236. However, a few days later, the day after her husband's funeral, Mrs. Turman was asked to come to a preliminary hearing. She was the sole witness. (R. 46). She was in a state of shock. (R. 257-58).

Mrs. Turman was taken to a tiny courtroom with one black male sitting at defense table. (R. 221). The prosecutor walked over to Petitioner, pointed at him, and said, "Is that the man that did it?" (H.C. 151, Appendix p. 133):

THE COURT: Ask her to identify.
Mr. MARS: Yes sir.
Q. Can you see this man sitting here?
[objection overruled]
Q. Is this the man that shot your husband?
A. Yes, sir.

(R. 49-50). As will be seen, her descriptions of the assailant at trial lent no credence to her prompted identification.

Mr. Arnold provided the second identification. He had seen the assailant very briefly before he himself was shot. Several days after the incident, while Mr. Arnold was still in the hospital with his mouth wired shut, police showed him six photographs. As Mr. Arnold testified, the purpose of looking at the photographs was "[t]o identify the person that shot me and Mr. Turman." (R. 448). He immediately excluded four of the photographs, which "just didn't look like him at all." (R. 449). He then wrote on a piece of paper the following information:

"Both of these two look a little like him!"
DID HE HAVE A MUSTACHE?
"I don't think so!"
WHAT TYPE SHIRT WAS HE WEARING?
"It was short sleeve. It was something like a red or orange and I think it was a knit material, pale."

(R. 455, 475, Appendix p. 134).

Mr. Arnold then picked out of the two photographs that looked "a little like him," the only one which had a name: Petitioner's photograph bore a white tag which revealed his name, "Darden." (R. 453, 477). At trial, Mr. Arnold could not remember the day he looked at the photographs, said the array was viewed in the afternoon when in fact it had occurred in the morning, and stated that none of the photographs had had names on them.

These are the identifications that convicted Petitioner. The tenuousness of these identifications, and the general unreliability of the identifiers' testimony, is illustrated by subsequent trial testimony.

The testimonial descriptions of the man who shot Mr. Turman and the man who wrecked his automobile several miles down the road are consistently inconsistent. Mrs. Turman emphasized that the man who came in the store that day and robbed her was very clean shaven. (R. 225, 237). James Stone, who witnessed the wreck on Highway 92 which allegedly occurred after the killing, and who stopped to see if he could help, testified that Willie Darden had a gray moustache that day (R. 318). Phillip Arnold, who admittedly only saw the man for 20-25 seconds (R. 494) and even during that

period was not keeping his eyes on the man every minute (R. 497), in his pretrial deposition indicated that the man who shot him had no hair on his face (R. 498), but at trial, after Mr. Stone gave his testimony, couldn't say for sure whether or not the man had a moustache because "it was a very thin one" (R. 497). Arnold also indicated that the man had an unusually long face (R. 443): Mrs. Turman testified that the man's face was the type of fat face consistent with a heavy-set person (R. 237).

The various descriptions given by Mrs. Turman are internally inconsistent and confused: she initially told one of the investigating officers that it would be hard for her to identify the man because she was scared to look while the crime was in progress and at one point covered her face with her hands so she would not have to see (R. 240, 280). She told that same officer that the man was the same height as herself, 5'6" (R. 288). In her pretrial deposition, she testified that the man was 5'8", "maybe" 6' (R. 256). Phillip Arnold testified that the man was very close to his own height, 6'2" (R. 495). When Mrs. Turman gave her initial description to Deputy Neill, she could not remember whether or not the man wore glasses (R. 227), but at trial she was adamant in her recollection that the man was definitely not wearing glasses (R. 227, 235).

The various descriptions of the clothes worn by the man who shot Mr. Turman and the man who wrecked his car on Highway 92 are equally conflicting. Mrs. Turman could not remember the color of the shirt worn by the man in the store, but was sure that it was a pullover, a T-shirt, with a stripe around the neck and bottom (R. 227). Phillip Arnold testified that the man was wearing a dull-colored knit shirt with a ring around the collar (R. 443). Mr. Stone testified that when Willie Darden got out of his car after the wreck, he was wearing a plain white shirt with buttons down the front, which were open, and which he took off after he got out of the car (R. 313).

The only physical characteristic which every witness who saw both men could agree on was that they were "colored." The testimony of Officer Neill, who ultimately arrested Mr. Darden in Tampa, is particularly telling: when asked if the man he arrested, Mr. Darden, fit the physical description given by Mrs. Turman of the man who killed her husband, Neill replied "Yes. The dark-colored automobile, the time element, the car crash

. . . just lead me to believe this possibly was him" (pretrial hearing of 1/9/73, p. 82). It is clear that this "physical description" given by Mrs. Turman would have fit any black man unfortunate enough to have been anywhere near the scene in Lakeland that day.

The various descriptions of the car seen at or leaving the scene of the crime were even more conflicting than the multitudinous physical descriptions of the perpetrator. Mrs. Turman told Officer Neill at the scene that she saw a black car (R. 272). Mrs. Hill, a neighbor who came out of her house after hearing shots, saw a green car leaving the scene (R. 299). Deputy Elliot, one of the first officers to report to the scene, testified that a Mr. Douglas, who had witnessed the wreck in front of the Lakeland Lounge on Highway 92, told him that the car involved in the wreck was maroon (pretrial hearing of 1/9/74, p. 34). Elliot also testified that several unidentified witnesses who were on the scene when he arrived told him that the suspect had left in a maroon car (Id). While there are certain colors which, depending on their intensity and value, are easily confused with each other, particularly from a distance, green and maroon occupy opposite ends of the color spectrum and are too distinctive to be confused. Deputy Al Brady, who responded to the accident scene, impounded the car, and later examined it, testified that the car which ran off the road in front of the Lakeland Lounge was greenish-gold in color (R. 426). It seems apparent that any car driven through the area by a 'colored' man at the appropriate time would have fit the description.

The only other evidence even remotely connecting Petitioner to the scene was a pistol found submerged in water thirty-nine feet from where Petitioner wrecked his automobile. So remote was this pistol that this Court did not mention it. It could not be connected to the offense (R. 347). No fingerprints, blood samples, confessions or any other evidence was presented.

Petitioner testified as the only witness for the defense. He admitted he was on furlough from prison, and was driving his girlfriend's car in Lakeland shortly after 4:00 p.m. on September 8, 1973, when his car broke down (R. 571). Two police officers helped him push the car out of the street and a woman who lived nearby, Mrs. Christine Bass, called two service stations for him but to no avail (R. 573). Finally, however,

Mr. Lawhorn came out of the real estate office in whose parking lot Appellant was stranded, and helped Mr. Darden fix the car's broken battery cable (R. 575).

Petitioner continued on his way, but a short time later had more car trouble which required stopping at a service station (R. 574). These delays put Petitioner behind schedule, as he was to attend a wedding that evening in Tampa (R. 575).

In his haste, Petitioner was apparently driving too fast and ran his vehicle off the rainy highway (R. 576). After he was arrested, Petitioner requested a lie detector test and a lineup (R. 590-591, 653-657). He denied any involvement in the incident at the Turmans' business (R. 593, 598).

On cross-examination, he described in great detail his activities during the early part of the day on September 8, 1973 (R. 610-619). He explained that a man named Roy had paid him ten dollars to take him to Lakeland, Florida, between 3:30 p.m. and 3:45 p.m. (R. 614-617). It was during Petitioner's return to Tampa that he twice had car trouble and eventually was involved in an accident (R. 619, 624, 634). He estimated that he had left Lakeland at 5:30 p.m. and concluded that the accident occurred a few minutes before 6:00 p.m. (R. 640). He arrived at his girlfriend's house before 6:45 p.m. (R. 64).

In sum, at the close of the evidence, the prosecution's case for conviction was a doubtful one and depended in overwhelming measure upon the jury's acceptance of the identification testimony of the state's two principal witnesses, and upon juror rejection of Petitioner's testimony. With this uncertainty, the summations to the jury took on particular importance.

b. Closing Argument "Facts"

The state's argument at guilt/innocence contained little if any relevant guilt/innocence issues. The crucial guilt/innocence issue, identification, was quickly dispatched.

The state had early on set up its argument. During voir dire (after asking the jury if they would promise to treat Petitioner "just like a white person), the state asked potential jurors if they would disregard the knee-jerk reaction that "they all look alike to me.":

> [D]id you hold to the old wives tale that all blacks look alike? Do any of you believe that?

(R. 114). The state sprung this trap later in closing:

> Ladies and gentlemen, that's eyewitnesses. You have heard Mr. Maloney stand before you and tell you how good fingerprint testimony is, how good tire tracks are. Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness.

(R. 747) (emphasis added).

The state's non-record and unsupportable assertions of the efficacy of eyewitness testimony were inherently prejudicial. Eyewitness testimony is roundly criticized as bad, and cross-racial identification, as here, is the worst. Barkowitz, P., and Brigham, J., Recognition of Faces: Own Race Bias, Incentive, and Time Delay, 12 Journal of Applied Social Psychology, 4:255 (1982); Brigham, J., and Maass, A., Accuracy of Eyewitness Identifications in a Field Setting, 42 Journal of Personality and Social Psychology 673 (1982). Having shored up its own case, the state proceeded to crack Petitioner's credibility through a litany of totally irrelevant arguments.

1. Convict/execute Petitioner because of incompetence of correctional personnel

Prosecutor McDaniel, the second of the state's attorneys to sum up to the jury, argued repeatedly and at length that the jurors should not limit themselves to consideration of Appellant's guilt or innocence of the crimes charged in the indictment, but should convict and execute him because the state Division of Corrections, which had authorized Appellant's weekend furlough, could not be trusted to keep him in prison under any other circumstance. "As far as I am concerned," McDaniel began, "there should be another defendant in this corutroom...and that is the Division of Corrections, the prisons" (R. 749). He continued:

> As far as I am concerned...this animal was on the public for one reason. Because the Division of Corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (R. 749).

> I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold].

> Yes, there is another defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (R. 749-50).
>
> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections." (R. 765).

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you." (R. 781).

These inflammatory comments bore no rational relationship to the question of Petitioner's guilt or innocence of the crimes with which he was charged in the indictment, and did not relate to punishment. The purpose for the diatribe was singular: execute Petitioner because incompetent correctional officials will "let him loose." Death is "the only way that I know that he is not going to get out on the public. It's the only way I know." (R. 753).

2. Prosecutors' opinions/beliefs

Both prosecutors also engaged in blatantly improper argument by placing in issue their own opinions and beliefs and those of their office. Mr. White, who spoke first, was responsible for the most flagrant example of this. He concluded his argument to the jury with the following words:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life (R. 748).

Mr. McDaniel repeatedly offered the jury his opinion that Petitioner was not a man worthy of belief. Since Petitioner's defense consisted solely of his own alibi testimony, the prejudice from such remarks is manifest. McDaniel's statements included the following:

a. Petitioner testified that he had asked for a lie detector test. In discussing that testimony, McDaniel said: "I don't believe anything he says...." (R. 770).

b. Petitioner testified that his alibi was the truth. McDaniel attacked this testimony in the following way: "Well, let me tell you something. If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out." (R. 755).

c. Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week." (R. 769).

d. Petitioner testified that he stopped at a service station after his automobile accident seeking assistance--testimony that was confirmed by one of the state's own witnesses. Yet McDaniel recounted Petitioner's testimony and said: "That's what he says. I don't know that he stopped at any . . . I guarantee you he was not going back to the scene of the accident until he had gotten home." (R. 765).

3. Prosecutorial expertise

The prosecutors informed the jury that they knew a lot more about what was going on than the jury; that, based upon their expertise, eyewitness identification cases were "the best;" that the defense was using age-old tricks taught them by the very prosecutor speaking, who had been a defense lawyer for seven years, and that generally the jury could rely on the state for knowledge and truth. For instance:

> The Defense Attorneys, which I am proud to say that I was about seven years.... (R. 756).
>
> [The defense attorney] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago. (R. 749).
>
> Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness (R. 747).
>
> I don't know how they're going to get around this (R. 757) (eyewitness identification).

Of particular note is the prosecutor's explaining to the jury that Petitioner testified the way he did because he was able to hear all the state's witnesses who preceded him:

> You couldn't hear Mr. Darden until yesterday, after he heard all of the oth~ witnesses (R. 767).
>
> But he [Petitioner] heard every word everybody said and I assure you, if we hadn't been able to prove the accident, they would never had admitted it." (R. 764).

The prosecutor's patriarchal attitude surfaces throughout the argument, and the jury was constantly reminded to look to the state for the truth: "I

want to thank you for your time. I assure you that it was necessary under the circumstances." (R. 749).

4. Improper appeal to emotions

The state voiced contempt and hatred for Petitioner, and urged the jury to do the same. The jabs began early in the summation: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." (R. 750). The state never let up.

McDaniel's repeated expression during summation of his wish that Petitioner had been maimed or killed further contributed to the denial of Petitioner's constitutional right to a fair trial. Over and over again, the prosecutor made comments like the following:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [Appellant] sitting here with no face, blown away by a shotgun, but he didn't.... I wish someone had walked in the back door and blown his head off at that point." (R. 125-56).

McDaniel returned to this theme when he described the four times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Petitioner] didn't get a chance to use it. I wish he had used it on himself." (R. 133). He made a similar comment in describing Petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (R. 134). Finally, while discussing the claim that Petitioner had changed his appearance between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat." (R. 136).

2. Facts at Sentencing

a. Evidence at Sentencing

The only additional evidence at sentencing was a statement by Petitioner. First, the trial judge recounted for the jury a conversation had in their absence:

> We have talked with Mr. Darden.... He has advised me that he told you already all he knew about this case on his testimony before. That you did not choose to accept his testimony, that he is presently emotionally upset, he does not know anything else that he could add....

(R. 892). Later, Mr. Darden did make a statement to the jury:

> I have never in my life carried a gun or a knife or any other type of weapon on my person.

> I have never in my life shot no one or robbed anyone. When I took that stand yesterday, I had nothing to hide from you peoples. I don't have anything to hide from you today.
>
> I have told you the truth so help me God. . . .

(R. 906).

This question of innocence was fundamentally important at sentencing. Including testimony, Petitioner spoke to the jury three times, professing his innocence. The trial judge found his exculpatory testimony to be a mitigating circumstance:

> "In mitigation, after conviction, the Defendant again emotionally and with what appeared on its face to be sincerity, proclaimed his innocence.
>
> * * *
>
> In mitigation, I find the following mitigating circumstances: . . . The defendant repeatedly professed his complete innocence of the charges."

Appendix at 71. The sentencing judge also considered the fact that Defendant was married and had seven children to be a mitigating circumstance. Id.

3. The Sentencing Determination Was Prejudically Infected by Closing Argument.

Petitioner believes that the closing arguments were prejudicial under any test. The prosecutors broke every single rule designed to ensure a fair trial. It seems quite simply surperfluous to discuss prejudice in this case. Reversal should be immediate.[15]

However, Petitioner will discuss the various tests for prejudice, inasmuch as prejudice is readily apparent. First, however, Petitioner will discuss the appropriate test for prejudice.

a. Caldwell v. Mississippi prejudice

In Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), the prosecutor (and judge) had informed the jury that their decision on death was subject to appellate review: "your decision is not the final decision . . . [y]our job is reviewable." 105 S.Ct. at 2646 (O'Connor, J., concurring). In

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15 It is extraordinary that no majority decision has directly addressed the effect of the argument at sentencing, in light of the fact that Petitioner has repeatedly argued the claim. See, e.g. Petition for Rehearing and Rehearing en banc, p. 4, filed March 10, 1983; Initial Brief of Appellant to the Eleventh Circuit, p. 18, filed January 14, 1982; Brief of Petitioner to the District Court; filed November 7, 1979; Petition for Rehearing, filed with the En Banc court, filed August 23, 1985.

fact, the jurors' decision in Mississippi is presumed correct on appeal, and is thus not subject to ab initio review.

Caldwell argued that "[t]he remarks at issue here divert the jury from focusing on the constitutionally mandated factors relating to the nature of the crime and the background and characteristics of the individual offender." Appellants brief, p. 27. He specifically directed this Court to Eighth, not Fourteenth Amendment, law to resolve the issue:

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> Woodson v. North Carolina, 428 W.S. 280, 304, 96 S.Ct. 2978, 2990-2991 (1976) (plurality opinion).
>
> See also, Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 874 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 98 S.Ct. 2954, 2963-2965 (1978) (plurality opinion); Roberts (Harris) v. Louisiana, 431 U.S. 633, 636-637, 97 S.Ct. 1993, 1995 (1977); Gregg v. Georgia, supra, 428 U.S. 153, 197, 96 S.Ct. 2909, 2966 (plurality opinion); Proffit v. Florida, 428 U.S. 242, 251-252, 96 S.Ct. 2966 (1976) (plurality opinion).
>
> The remarks by the prosecutor diverted the jury from meting out the "unique, individualized judgment regarding the punishment that a particular person deserves," Zant v. Stephens, supra, U.S. ___, 103 S.Ct. at 2755 (concurring opinion, Rehnquist, J.). The sentence should be reversed.

Appellant's brief, p. 28.

Respondent, State of Mississippi, directed the Court to "fundamental fairness" due process considerations, and argued that review in this Court was restricted to alleged error which "so infected the trial with unfairness so as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Resp. brief, pages 23-24. Respondent in Caldwell cautioned this Court that "not every trial error or infirmity which might on direct appeal of a federal conviction call for an application of a federal appellate court's . . . supervisory powers correspondingly constitutes the denial of due process." Resp. brief, p. 25.

This Court responded to Donnelly, and embraced Caldwell's Eighth Amendment argument. In so doing, the Court placed a reliability gloss on the restrictive Donnelly rule in capital cases. The Court first underscored that Donnelly "does not insulate all prosecutorial comments

from federal constitutional objections." 105 S.Ct. at 2644. After distinguishing the Donnelly facts, this Court held that "[b]ecause we cannot say that his [argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646.

Thus under Caldwell, improper prosecutorial comments render a sentencing proceeding fundamentally unfair (per Donnelly) when the comments cannot be said to have had no effect on the delicate and individualized sentencing process.

The State herein repeatedly argued at trial that this "animal" should be sentenced to death because the Department of Corrections could not be trusted to keep him in prison. The State wanted Petitioner to die a violent death as soon as possible, and graphically urged the jury to make that task possible. It is impossible to read the closing arguments without concluding they had some effect on sentencing.[16]

The argument is not saved by the fact that in Florida the jury recommends punishment, and it is the trial judge's obligation to impose it. Under Florida law, a trial judge must follow the jury recommendation "unless the facts suggesting [a different sentence] are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). "A jury recommendation under our trifucated death penalty statute should be given great weight." Id at 910.

No court majority has expressly examined the arguments to determine whether they "affected" in any way the death sentence. A stay should be granted so that the issue can be addressed.

b. Donnelly / Strickland Prejudice.

In Donnelly, closing arguments did not render the trial (guilt/innocence) fundamentally unfair because 1) the trial judge agreed that the remarks were improper, and gave a strong curative instruction, 2) the prosecutor's comments were ambiguous, and 3) the argument did not

---

[16] The circuits court's rejection of Petitioner's claim through application of a higher standard is thus improper. See text, section 1, a, supra.

prejudice a specific constitutional right. Caldwell, 105 S.Ct. at 2633. No such saving factors exist in Petitioner's case, just the opposite.

First, as in Caldwell, "[t]he trial judge in this case not only failed to correct the prosecutor's remarks, but in fact openly agreed with them." Id. at 2645. After the prosecutor at trial made one of his tasteless comments wishing that Mr.Darden was dead ("The only thing he hasn't done that I know of is cut his throat." R. 779), counsel objected. The trial court stated: "Objection will be overruled. Go ahead, sir." (R. 780). Again, as in Caldwell, the trial judge effectively "stated to the jury that the remarks were proper," 105 S.Ct. at 2645, and, unlike Donnelly, no curative instruction was given.

Second, the closing argument here contained no ambiguity. "[T]he prosecutor's remarks were quite focused, unambiguous, and strong." 105 S.Ct. at 2645. The diatribe by the prosecutors here was capable of no other interpretation than that the State hated and despised Petitioner, wished they could see him with his face blown away, believed the Department of Corrections' personnel who allowed him a furlough should be killed, and knew that if Petitioner was not killed by the jury's vote, the Department of Corrections would let this "animal" out again:

> [T]his animal was on the public for one reason. Because the division of corrections turned him loose, let him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking.
>
> * * *
>
> I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth.
>
> * * *
>
> Mr. Turman is dead because that unknown defendant we don't have in the corrections (division of corrections) allowed it.

(R. 749-50). These are just a few of the arguments. More are reproduced elsewhere. The entire argument was objectionable.

Finally, the argument intentionally implicated Petitioner's constitutional rights---his right under the Eighth Amendment to "an individualized determination" of sentence. Zant v. Stephens, 103 S.Ct. 2733, 2743 (1983). The State's demands directed the jury away from the proper considerations at sentencing and urged extraneous factors (hatred,

complaints against the Department of Corrections, desire to see Petitioner with his face blown off and his throat slit, placed on a leash, etc.). These arguments are insidious. They accomplish nothing except assuring that the death penalty is meted out arbitrarily and "imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 102 S.Ct. at 878 (O'Connor, J., concurring) (emphasis added).

The prosecutor's incindiary argument, tossed into the powder keg of a black/white killing, with sexual advances on the victim's widow, did nothing but fog sentencing issues at least, and at most whipped the jury into a lynching frenzy, the antithesis of Eighth Amendment jurisprudence. It actually affected the death verdict, there is a "reasonable probability" that it did, and it cannot be said that it had "no effect." Under Donnelly, Strickland, Caldwell, Brooks, or under any currently uncharted prejudice criteria, this argument cannot be the predicate for death. See Magistrate's Report and Recommendation ("I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was prejudiced against Darden by the argument." App. 23).

2.

OPPOSITION TO CAPITAL PUNISHMENT
CANNOT ALONE DISQUALIFY PEOPLE
FROM SERVING AS JURORS IN CAPITAL CASES

Appellant in good faith believes that the 10-2 en banc decision is in direct conflict with Wainwright v. Witt, 105 S.Ct. 844 (1985); that the Court below overlooked or misinterpreted important facts from the record; and that the Court's decision involves a question of exceptional importance to death sentenced inmates, and their constitutional right to prevent the selection of a jury "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 512 (1968). A stay should issue so that the issue can be fully presented.

The issues involved are simple; the ramifications deadly. First, may a defendant have jurors hear his case who are opposed to capital punishment, if they will nevertheless perform the duties imposed by their oath and conscientiously apply the law to the facts. Witt says "yes". 105 S.Ct. at 850-51. Second, how must the determination of eligibility be made, and what deference is due the state court's determination? Witt says that the trial judge is best suited to make the determination, the judge

should excuse jurors who leave the definite impression that their views would substantially impair the performance of juror duties, and that the decision is entitled to deference, absent an exception to Section 2254(d).

The problem with juror Murphy is that he was never provided the opportunity to address the "performance of duties" question:

> "Do you have any moral ... religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?"
>
> Mr. Murphy: "Yes, I have."

Venireman Murphy was clearly shown to be a person who could not vote in favor of capital punishment without violating his principles. He was not asked whether, if the circumstances were sufficiently strong and aggravating, he could nevertheless vote to recommend the death penalty. Mr. Murphy was never questioned regarding his ability to abide by the instructions of the court in resolving his conflicting values. See, Patton v. Yount, 467 U.S. ___, 104 S.Ct. 2885, at 2891 (1984).

The record further reflects the judge's intent to excuse any potential juror who, through willing "to follow [the law], would be going against his principle." (Vol. III - 18) By affirming this juror's excusal, the Eleventh Circuit has emasculated Witt and Witherspoon.

Under Darden, the only question now is: are you against capital punishment. That ends the inquiry, pursuant to the per curiam decision, because, naturally, one opposed to capital punishment would have to violate his or her principles in order to vote for it. That is not enough for excusal under Witt.

Having come to the conclusion that it is enough, the per curiam opinion's resolution of this case is of course unassailable. Either the judge must ask, "could you put aside your beliefs," or not. The Eleventh Circuit says not, Witt says otherwise - "jurors who, though opposed to capital punishment, will nevertheless conscientiously "apply the law" are competent. Witt 105 S.Ct. at 850.

Appellant believes the remand was to apply Witt. The proper application is this: Mr. Murphy was not asked whether he could apply the law.

which is the correct legal standard. Since he was not, no presumption of correctness attaches.

The per curiam finds two "record" facts in support of the judge's excusal, seeking refuge in Witt. First, that the trial judge could observe demeanor, as in Witt. There was, however a much greater opportunity for "credibility" determinations in Witt: there was a colloquy:

> "[Q. prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> "[A. Colby:] I am afraid personally but not -
>
> "[Q]: Speak up, please.
>
> "[A]: I am afraid of being a little personal, but definitely not religious.
>
> "[Q]: Now, would that interfere with you sitting as a juror in this case?
>
> "[A]: I am afraid it would.
>
> "[Q]: You are afraid it would?
>
> "[A]: Yes, sir.
>
> "[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> "[A]: I think so.
>
> "[Q]: You think it would.
>
> "[A]: I think it would.
>
> "[Q]: Your honor, I would move for cause at this point.
>
> "THE COURT: All right. Step down."

Tr. 266-267. In contrast here there was one question. The second factor cited is that there was no objection to the excusal. There was, in fact, a continuing objection, allowed by the trial court. R. Vol. I, p. 106; R. Vol. III, 19.

Murphy opposed capital punishment. Appellant was entitled to have him serve.

3.

DEFENSE COUNSEL CONDUCTED NO INVESTIGATION FOR, AND PRODUCED NO EVIDENCE AT, SENTENCING, BECAUSE OF COUNSEL'S MISTAKEN BELIEF THAT THE FLORIDA STATUTE LIMITED EVIDENCE IN MITIGATION, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

The post-Furman Florida death penalty statute came into effect thirteen months before Petitioner's trial. His was the first capital trial in the circuit under the statute.

Petitioner was represented at trial by an attorney, Mr. Maloney, who had been licensed for four months, and who had never seen, much less tried, a capital case. (H.C. 132, 141). Co-counsel was Mr. McDaniel, who had never tried a capital case. (H.C. 141).

In preparation for sentencing, the attorneys decided to offer no evidence in mitigation: "That decision was made after a perusal of the mitigating circumstances in the Florida Statute 921.141. And we reached the conclusion that Mr. Darden did not qualify for any of the mitigating circumstances." (H.C. 154). Mr. Maloney further explained the "perusal":

> We were operating on the premise at that time that we were limited to those mitigating circumstances. At least I was completely unaware that any mitigating circumstance, if relevant, is admissable.
>
> Something should have been offered in mitigation. In any capital case such as this, something can be offered in mitigation.
>
> Q. Would it be fair to say that you and co- counsel were using 921.141 -- I believe it's subsection B, Mitigating Cicumstances -- as being a closed shop? That that was all you could consider in the way of mitigating circumstances and nothing outside the four corners of the statute?
>
> A. Until the Supreme Court ruled in

> Gardner v. Florida, that was my opinion. And Gardner v. Florida considerably postdated this trial.
>
> Q. Okay. But that was what you were all thinking on that day --
>
> A. Yes, sir.
>
> Q. -- on January 19th, 1974.
>
> A. Yes, sir.
>
> * * * *
>
> A. We certainly went through the mitigating circumstances in 921.141, and I believe we came to the conclusion that there were no mitigating circumstances and no evidence was presented.

(H.C. 154-55). Maloney learned he was wrong after Lockett: "Lockett is the first time that I found out from the United States Supreme Court that mitigating circumstances were not limited to the enumerated mitigating circumstances." (H.C. 178).

Co-counsel McDonald felt similarly limited (H.C. 337), as did the chief public defender, who testified below, but who did not participate at trial. The following colloquy occurred between the magistrate below and the chief public defender:

> Q. And in connection with the penalty phase, was Mr. Darden consulted or advised or prepared for his testimony at the penalty phase?
>
> A. I think he was, your honor.
>
> Q. To your knowledge, was he or wasn't he?
>
> A. Yes, because we had discussed it. We had taken the statute and gone down his specific grounds for mitigating circumstances, and we could find no grounds, as you know what the six were.

(H.C. 245-46).

Consequently,

> In the sentencing portion of the trial, there were practically no mitigating circumstances brought forth at all. Mr. Darden was allowed to testify and did testify, did speak to the jury, made his own presentation to the jury.

The above testimony was given by trial counsel in 1979, before the magistrate, concerning a trial in 1973, one of the earlier post-Furman trials in Florida. This cannot be effective assistance. Even in 1979, counsel recognized the failings:

> A situation like State of Florida versus Willie Darden would not happen in that office right now. They have got a capital trial unit, a capital appeals unit. They are well aware capital cases are different, and they treat them as such.

A. RESTRICTIONS ON MITIGATING EVIDENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Perhaps the most firmly settled and closely enforced eighth amendment mandate applicable to capital sentencing is that the process for determining the appropriate punishment be individualized. Today it is clear that this mandate means that there can be no restriction, either expressly by statute, Lockett v. Ohio, 438 U.S. 586 (1978), or as applied in a particular case, Eddings v. Oklahoma, 455 U.S. 104 (1982); Green v. Georgia, 442 U.S. 95 (1979), upon the consideration of mitigating factors by judge or jury. The settled nature of this mandate places its critical importance beyond question, for it is at the heart of that which is required of the capital sentencing process.

This requirement that capital sentencing be based upon an individualized determination which accords full and fair consideration to the mitigating features, as well as the aggravating features, of each case has emerged as the central principle of the Court's eighth amendment jurisprudence. See Zant v. Stephens, ___ U.S.___, 103 S.Ct. 2733, 2743-44 (1983) ("What is important at the selction stage is an individualized determination...." (emphasis in original)). This is so because:

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of

> the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of the factors which may call for a less severe penalty.

Lockett v. Ohio, 438 U.S. at 605 (emphasis added). This risk is "incompatable with the commands of the Eighth and Fourteenth Amendments." Id. See also Enmund v. Florida, 458 U.S. 782, 827-31 (1982) (O'Connor, J., dissenting) (summarizing the Court's holdings and rationale).

Accordingly, the complete consideration of the mitigating features of a case is the single most important safeguard for assuring reliability in the capital selection process. Where such features are excluded, the risk of mistake is too high to be constitutionally tolerable, thus the Court must "remove any legitimate basis for finding ambiguity concerning the [mitigating] factors actually considered ...," Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring) "[i]n order to ensure that the death penalty was not erroneously imposed ...." Id. at 118. That risk of error is great in the present case.

B. THE FLORIDA STATUTE RESTRICTED MITIGATING EVIDENCE IN 1974

The modern Florida death penalty statute was enacted in 1972, in the wake of Furman v. Georgia, 408 U.S. 238 (1972). Three separate provisions of the statute appeared on their face to limit consideration of mitigating factors to only those expressly set out in the statute. Section 921.141 (2), Florida Statutes (1975) directed that the jury consider:

> (a) whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) based on these considerations,

> whether defendant should be sentenced to life or death.

(emphasis added). The same direction was given to the judge in Section 921.141(3) to consider mitigating circumstances "as enumerated in subsection (7)" and to make written finding "based upon the circumstances in subsection (6) and (7)." Subsection 921.141(6) (referred to as subsection (7), above) states that mitigating circumstances "shall be the following: [list of specific factors]." Accordingly, from a plain reading of the statute, it appears that consideration of mitigating factors by judge and jury was limited to only those specifically set out in the statute. This reading was carried forward in State v. Dixon, 283 So.2d 1 (Fla. 1973), the landmark decision interpreting the statute. The court's emphasis in Dixon was on the consideration of statutory mitigating factors. The opinion refers frequently to "the" mitigating circumstances including in such references only the statutorily enumerated circumstances and specifically refers to "the mitigating circumstances provided in Fla. Stat. 921.141 (7), F.S.A." in describing the weighing process. Id. at 9. In dissent Justice Ervin's opinion also specifically acknowledges the limitation on consideration of mitigating circumstances. In the course of reviewing the statute, this Court suggested that the mitigating circumstances provision of the statute may be open-ended, Proffitt v. Florida, 428 U.S. at 250 n.8.

However, six days after Proffitt was announced, the Florida Supreme Court reviewed the statute and explicitly declared that the Florida statute did indeed restrict mitigating factors to those set forth in the statute, Cooper v. State, 336 So.2d 1133, 1139 &n.7 (Fla. 1976), cert denied, 431 U.S. 925 (1977), just as the statute said, as Dixon confirmed, and as counsel here believed. Cooper had proffered among other factors his stable employment history as a mitigating circumstance relevant to his character. The

sentencing judge, however, prohibited the introduction of such evidence at the penalty trial. The Florida Supreme Court held that the trial judge properly precluded the presentation and consideration of the proffered mitigating evidence. The opinion emphasized that the "sole issue" in a penalty trial under the statute was "to examine in each case the itemized aggravating and mitigating circumstances." Id. at 1139 (emphasis added). The court reasoned that allowing nonstatutory mitigating factors to be presented and considered would make the statute unconstitutional, as it would "threaten[] the proceeding with the undisciplined discretion condemned in Furman v. Georgia." Id. The court pointed to and emphasized the statutory limit on consideration of mitigating circumstances -- those "enumerated in subsection (7)," -- as showing the intent to avoid such arbitrariness. Id. at n.7 (emphasis in original). The court underscored that these were words of "mandatory limitation," Id. (emphasis in original), thus leaving no doubt as to its interpretation of the statute. With regard to the specific nonstatutory mitigating factor before the Court, it commented that "employment is not a guarantee that one will be law-abiding," and then expressed in its specific holding:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty ... and we are not free to expand that list.

Id. (emphasis added). A plain and fair reading of the opinion in Cooper was thus that consideration and presentation of mitigating factors was strictly limited to only those specifically set out in the statute, and had been so limited during Petitioner's trial. There is no lack of clarity in the words "mandatory limitation."

In the two years following the Cooper decision, the Florida Supreme Court adhered to its construction of the

mitigating circumstances provision as exclusive. See, e.g., Gibson v. State, 351 So.2d 948, 951 & n.6 (Fla. 1977); Barclay v. State, 343 So.2d 1266, 1270-71 (Fla. 1977). More importantly, Dixon, later ratified by Cooper, was the law when Mr. Darden's case was tried and it was the law that guided his defense counsel. It was not until almost six years later after trial that Lockett was announced, leading to the change in the Florida Supreme Court's interpretation. This Court has recognized the change in Florida law that occurred in 1978 rrom consideration of only "statutory mitigating circumstances" to "any mitigating circumstances." Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340, 347 n.4 (1984). See also Barclay v. Florida, 467 U.S. ___, 103 S.Ct. 3418, 3430 n.2 (1983) (Stevens, J., concurring).

After Lockett, the Florida Supreme Court did an abrupt turnaround and reconstrued the statute to allow nonstatutory mitigation. Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (opinion on rehearing). This reconstruction, though it may save the facial validity of the statute, cannot be held to apply to Mr. Darden, whose trial occurred when the state's highest court expressly applied the statute to restrict mitigating evidence. It is the statute and the Dixon holding that guided Mr. Darden's trial.

C. TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING

Petitioner's ineffective assistance of counsel claim is this: counsel did not prepare for sentencing, and as a result Petitioner was denied meaningful individualized consideration. Whether this was through counsel's neglect, Strickland v. Washington, 104 S.Ct. 2052 (1984), or because the State, through its statute, prevented such preparation, United States v. Cronic, 104 S.Ct. 2039 (1984), a reversal of Petitioner's sentence is required.

"[I]f counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Cronic, 104 S.Ct. at 2047. Almost sleeping counsel is no counsel at all. There was no adversarial sentencing hearing. There was no hearing at all.

Similarly, if counsel's failings are assignable to the State, no prejudice need be shown. When the surrounding circumstances "make it so unlikely that any lawyer could provide effective assistance," then ineffectiveness is "presumed without inquiry into actual performance at trial." Id. at 2048. A statute that a lawyer reasonably believes to restrict mitigation produces, in an Eighth Amendment setting, surrounding circumstances making it impossible to perform as an advocate: advocacy requires investigating and producing mitigating circumstances, and the statute prevented it.

This Court should determine whether it is in fact ineffective per se for trial counsel in a capital case to not investigate to discover mitigating circumstances. If the statute makes an attorney's decision to forego investigation "reasonable," a straight Eighth Amendment violation arises, and no prejudice need be shown.

The Eleventh Circuit last addressed this issue in its 1983 panel 2-1 decision. Like the prosecutorial misconduct issue, this claim has laid dormant since the Witherspoon issue began steering the course of Petitioner's litigation. Strickland and Cronic have intervened, but the Eleventh Circuit has continued to restrict its rulings to the Witherspoon ground.

Petitioner must again stress that this is a first writ case, and the accelerated pace at which Petitioner must seek relief is occassioned by Respondent trying to moot the

orderly presentation of issues by eliminating him as a party to the litigation. This effort came while a stay was in effect, and should not be tolerated. Petitioner should be allowed to present this substantial claim to the Court in a well-reasoned petition.

Mr. Darden's lawyers, by their own admission, did nothing for sentencing. No prejudice need be shown. Prejudice is apparent, however. Not only did the statutory restriction on mitigating evidence convince counsel not to investigate, it also apparently induced counsel to not argue mitigation that was present. At sentencing closing argument, in a mere two and a half pages, counsel concluded: "I think that [sic] shouldn't kill Willie Jasper Darden, because God said you can't. I think that you shouldn't kill him because you might make a mistake." (R. 897). The judge himself determined there were two nonstatutory mitigating circumstances (innocence and family), but counsel did not even argue these to the jury. The resulting jury recommendation was thus robbed of any individualized considerations, and Petitioner's Sixth, Eighth, and Fourteenth Amendment rights were violated.

CONCLUSION

This is a first writ case. The well-established standards for granting a stay of execution pending the filing of a petition for writ of certiorari bear repeating:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1305, 95 S.Ct. 1, 3, 42 L.Ed.2d 17 (1974)(Powell,

J., in chambers).
See Karcher v. Daggett, ___ U.S. ___, 102 S.Ct. 1298, 71 L.Ed.2d 635 (1982) (Brennan, J., in chambers).

White v. Florida, 457 U.S. ___, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982) (Powell, J., in chambers).

Unlike petitioner White, irreparable harm -- execution -- will result, without a stay. Petitioner Darden has, unlike White, specified the substantive issues for which certiorari will be sought and the reasons why review is appropriate. White v. Florida, supra, 103 S.Ct. at 1-2. The probability is reasonable that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari.

Without question, the granting of stays of execution is not automatic, Maggio v. Williams, ___ U.S. ___, 104 S.Ct. 311, 313 (1983). But "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983), at 3391. Substantial legal issues are outstanding, which merit detached deliberation, without the urgency created by one party refusing to be bound by the rules of procedure. The constitutional claims of Petitioner DARDEN have been identified, and the case is clearly an exceptional one.

WHEREFORE, Petitioner WILLIE JASPER DARDEN, prays the Court through its Associate Justice to enter its order granting a stay of mandate herein and stay the execution of his death sentence scheduled to be carried out on Wednesday, 04 September 1985 at 7:00 a.m.

Respectfully submitted,

ROBERT AUGUSTUS HARPER

317 East Park Avenue
Tallahassee, Florida 32301
904-224-5900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served on

The Honorable Jim Smith
Attorney General
Elliott Building
Tallahassee, Florida 32301 by hand/[redacted]

and

Mr. Richrd W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014 by [redacted]/mail

this 9th day of September, 1985.

Respectfully submitted

ROBERT AUGUSTUS HARPER, JR.
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RAH:b/

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 85-5319

A-181

WILLIE JASPER DARDEN,
Petitioner,

v.

LOUIE L. WAINWRIGHT
as Secretary, Department of
Corrections, State of Florida
Respondent.

APPENDIX

To Petitioner's Application for Stay of Execution
Pending Review of Petition for Writ of Certiorari

To: THE HONORABLE LEWIS F. POWELL, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit

ROBERT AUGUSTUS HARPER, JR.
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RAHb/

APPENDIX

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RAHb

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA ex rel. WILLIE JASPER DARDEN, Petitioner	
vs.	No. 79-366 Civ.T.-H
LOUIE L. WAINWRIGHT, Secretary, Division of Corrections, State of Florida, Respondent	

REPORT AND RECOMMENDATION

A state prisoner, Willie Jasper Darden, under sentence of death for murder brings this habeas corpus action attacking his conviction and his sentence on numerous grounds. After consideration of the state court records[1] and the evidence adduced at an evidentiary hearing,[2] and the extensive memoranda filed by the parties, I have concluded that two of petitioner's claims merit habeas corpus relief. After careful consideration of the remaining twenty-four claims, I find that they are without constitutional merit.[3]

BACKGROUND

On the evening of September 8, 1973, Mrs. Helen Turman was alone in her furniture store located in Lakeland, Florida. Sometime between 5:00 p.m. and 6:00 p.m. an individual came to the store and asked to look at some furniture and furnishings. After looking at a few items, the individual left, indicating that his wife would be in to the store. Sometime later, the same individual returned to the store, this time asking to look at ranges and stoves. While Mrs. Turman was figuring out the price

1. Reference to the trial transcript shall be designated herein: T-.

2. Reference to the evidentiary hearing shall be designated herein: H-.

3. In light of the ultimate recommendation that habeas corpus relief be granted, the twenty-four meritless claims will be treated in summary fashion in this report.

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of the items, the individual pulled a gun and demanded the contents of the cash register. It was at this point that Mrs. Turman's husband, Carl, unexpectedly walked into the store. The assailant responded to this interruption by shooting Carl Turman between the eyes at close range. The body dropped in the doorway, halfway in the store and half out.

With Mr. Turman lying dead or dying on the floor, the assailant ordered Mrs. Turman to get down on the floor. He then demanded that she remove her false teeth and perform oral sex on him. When she protested, he ordered her to stand up, and began walking her to the front of the store. A teenaged neighbor and parttime employee of the Turmans, Phillip Arnold, having heard the connection arrived at the store at this time. Not realizing what was going on, Phillip attempted to move Mr. Turman's body all the way into the shop. As the teenager bent over the body, the assailant shot him in the mouth. As the youth attempted to flee, he was shot in the neck and then in the side.

A short time later, some three miles from the site of the murder, assault and robbery, petitioner Willie Jasper Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he had been driving, and smashed into a telephone pole. Petitioner left the scene and returned to Tampa where he spent the night. He was initially arrested and charged with leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery, and assault with intent to commit rape. The grand jury returned indictments charging first degree murder, robbery and assault with intent to commit murder in the first degree. At all times petitioner has maintained that he was not present at the Turman's store and is innocent of the charges.

Both before and during trial, petitioner was identified as the assailant by Helen Turman and Phillip Arnold, eye-witness victims of the criminal episode. The trial jury found petitioner guilty of murder in the first degree, assault with intent to

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commit murder in the first degree, and robbery. After the second phase of the bifurcated trial, the jury recommended the imposition of the death penalty. After enumerating its findings of aggravating and mitigating circumstances, the trial court sentenced petitioner to death by electrocution.

POST-TRIAL HISTORY OF THE CASE

Petitioner took a direct appeal of his conviction to the Supreme Court of Florida. On February 18, 1976, the court affirmed the judgments and sentences. Darden v. State, 329 So.2d 287 (Fla. 1976). The Supreme Court of the United States granted petitioner's writ for certiorari on November 1, 1976, Darden v. Florida, 429 US 1036 (1977) on the sole issue of whether the prosecution's summation to the jury in the circumstances of this case deprived petitioner of due process of law, and thereafter dismissed the writ as improvidently granted on April 19, 1977. Darden v. Florida, 430 US 704 (1977).

Petitioner's sentence was the subject of a clemency hearing on March 30, 1978, and again on May 8, 1979. Petitioner filed a lawsuit in the Second Judicial Circuit, in and for Leon County, Florida, Darden v. Graham, et al, case no. 79-1193, seeking injunctive and declaratory relief with regards to the result of the clemency proceeding. Pursuant to Defendant's Motion to Dismiss, the Complaint was dismissed with prejudice on May 16, 1979. The Governor then signed Petitioner's death warrant on May 18, 1979, and on May 21, 1979, the Supreme Court of Florida affirmed the trial court's dismissal of May 16. Darden v. Graham, case no. 56,877.

Petitioner then filed two actions: (1) the habeas corpus petition which is the subject of the instant case, and (2) a Motion to Vacate, pursuant to Fla. R. Crim. P. 3.850, and a Motion for New Trial, pursuant to Fla. R. Crim. P. 3.600 (filed in the original action in this cause, State of Florida v. Darden, case no. 73-2027-C). A hearing was held on both motions on May 21, 1979. A motion to secure the presence of Darden at the

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hearing was denied and all motions on the merits, including a motion for stay of execution, were denied. (Court Exhibit No. 3) On May 22, 1979, the Supreme Court of Florida ffirmed the order of the trial judge and denied yet another application for stay of execution. Darden v. State, case no. 56,910

In his initial Petition for Writ of Habeas Corpus, filed with this Court, petitioner alleged two grounds:

(1) The prosecutor's closing argument was so fundamentally prejudicial and unfair that it deprived him of due process of law;

(2) The pre-trial identification of him by the victim's wife was so impermissibly suggestive that its admission into evidence deprived him of due process of law. (This claim was withdrawn and abandoned. Pretrial Stipulation Paragraph 3 b)

Based upon a review of the petition and the materials attached, this Court found that petitioner's constitutional assertions "were not facially frivilous in any sense, but indeed present substantial claims," and stayed petitioner's execution.

By means of interrogatories propounded to petitioner on July 3, 1979, respondent was able to ascertain that petitioner was also alleging the following constitutional claims in support of his petition for habeas corpus relief:

1. The execution of the petitioner's death sentence would violate the Eighth and Fourteenth Amendments of the Constitution of the United States because that sentence was imposed pursuant to a pattern of arbitrary and capricious capital sentencing;

2. Petitioner's execution would constitute excessive punishment in violation of the Eighth Amendment and a deprivation of life without due process of law under the Fourteenth Amendment because the justifications asserted to support the death penalty are factually insufficient to warrant the invasion of the fundamental right to life;

3. The death sentence imposed upon the petitioner constitutes a cruel and unusual punishment forbidden by the Eighth Amendment in that it constitutes the unnecessary infliction of

physical and psychological pain and torment;

4. Petitioner has been sentenced to die in violation of the Equal Protection clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of racial discrimination in capital sentencing;

5. Petitioner has been sentenced to die in violation of the Equal Protection Clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of discrimination against poor persons in capital sentencing;

6. Petitioner has been sentenced to die in violation of the Equal Protection Clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of inflicting capital punishment upon male offenders, and sparing similarly situated female offenders, on the sole ground of their respective sexes;

7. The death sentence imposed upon the petitioner constitutes cruel and unusual punishment forbidden by the Eighth Amendment because, considering all of the relevant circumstances of the offense and the offender, it is grossly disproportionate and excessive;

8. The death sentence imposed upon the Petitioner is inappropriate, improper and illegal because considering all of the relevant circumstances of the offense and the offender and the sentence imposed in comparable cases it is disproportionate, excessive and unwarranted;

9. Petitioner's death sentence was imposed in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because he was sentenced to die following a trial at which he was denied, solely because of his poverty, a fair opportunity to prepare and present evidence as to why the death sentence should not be imposed. For the same reason the sentencing jury was deprived of evidence indispensable to the rational determination of penalty, and the death penalty imposed on the petitioner is accordingly a cruel and unusual punishment forbidden by the Eighth Amendment;

10. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that were fundamentally unfair in that petitioner was not given adequate notice and an opportunity to present evidence and argument addressed to the specific issues that the sentencing authority considered determinative of the question of life or death;

11. The execution of the petitioner's death sentence will deprive him of life without due process of law, and will deprive him of the equal protection of the laws, in violation of the Fourteenth Amendment, because that sentence was reviewed and affirmed by the [Florida] Supreme Court pursuant to procedures that (A) were fundamentally unfair, in that the petitioner was denied notice and an opportunity to be heard regarding the "similar cases" that the [Florida] Supreme Court compared with his as the basis for its "proportionality review," and (B) denied the petitioner on the sole ground of his indigency, access to facts regarding "similar cases" which a death-sentenced defendant with adequate means could have presented to the [Florida] Supreme Court as the grounds for reducing his sentence from death to life imprisonment;

12. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that were fundamentally unfair in that the petitioner was denied timely notice of, and a fair opportunity to prepare to meet, prejudicial evidence that was presented at his penalty trial.

13. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that permitted a sentence of death to be rendered based upon facts that were not established beyond a reasonable doubt;

14. Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth Amendment, and was imposed in

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violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it was based upon proceedings in which the prosecutor was permitted to urge a death sentence upon grounds that were couched in inflammatory argument of the prosecuting attorney and improper professional conduct;

15. Petitioner's death sentence was imposed and affirmed in violation of the Sixth and Fourteenth Amendments because he was denied the effective assistance of counsel at the penalty stage of his capital prosecution;

16. Petitioner's conviction and sentence of death deprive him of the equal protection of the laws and of his life without due process of law, in violation of the Fourteenth Amendment, because he was convicted and sentenced to die following a trial at which he was denied, solely because of his poverty, a fair opportunity to prepare and present his defense to the capital charge against him;

17. Petitioner's death sentence was imposed in violation of the Fifth, Sixth and Fourteenth Amendments, with the purpose and effect of penalizing the exercise of rights secured by those Amendments, in that it was imposed pursuant to a pattern and practice of the prosecuting and judicial authorities of the County of Polk, Tenth Judicial Circuit of State of Florida to reserve the sentence of death for capitally-charged defendants who refuse to plead guilty and thereby to waive their Fifth Amendment right to trial and their Sixth Amendment right to trial by jury;

18. Petitioner's conviction and death sentence were rendered in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because he was indicted by a grand jury, and was convicted and sentenced to die by the recommendation of a petit jury, that were selected through procedures which systematically excluded racial minorities from jury service;

19. Petitioner's death sentence is a cruel and unusual punishment and deprives him of life without due process of law because it was imposed pursuant to the recommendation of a jury selected through procedures that systematically excluded from jury

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service persons having conscientious or religious scruples against capital punishment;

20. Petitioner's death sentence was imposed in violation of the Sixth Amendment because it was imposed pursuant to the recommendation of a jury from which persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross section of the community;

21. The execution of the petitioner's death sentence would deprive him of life without due process of law, and of the equal protection of the laws, in violation of the Fourteenth Amendment, because the procedures used in the consideration and denial of his application to the Office of Executive Clemency for commutation of that sentence were fundamentally unfair, irregular and arbitrary;

22. The execution of the petitioner's death sentence would deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment, because the State of Florida was denied and denies the petitioner, solely on account of his poverty, opportunities for commutative relief against that sentence which are available to death-sentenced prisoners who have the financial means to afford them;

23. The execution of the petitioner's death sentence would deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment because he was legally incompetent and the State of Florida has denied him, solely on account of his poverty, opportunities available to death-sentenced prisoners who can afford them, to show that he was legally incompetent to be put to death;

Petitioner also filed a Supplemental Petition for Writ of Habeas Corpus, September 12, 1979, in which he added a claim of ineffective assistance of counsel. This brought the total number of the claims being alleged by petitioner to twenty-six. Respondent has raised no objection to the inclusion of these additional claims, and has also waived any claim that petitioner has

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failed to exhaust state court remedies as to any claim presented. Therefore, all twenty-six claims are now properly before this Court. However, as noted above, the claim relating to pre-trial identification has been withdrawn, leaving twenty-five claims for further consideration.

INFLAMMATORY ARGUMENT OF THE PROSECUTING ATTORNEY AND IMPROPER PROFESSIONAL CONDUCT.

> In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may 'strike hard blows' but not 'foul ones.' Berger v. United States, 295 U.S. 78, 88 (1935); Brady v. Maryland, 373 U.S. 83, 87-88 (1963). If that safeguard fails, review remains available under due process standards. United States v. Ash, 413 U.S. 300 (1973), 320.

Petitioner contends that remarks made by the assistant state attorneys during closing arguments were so prejudicial to his cause as to constitute a denial of his right to due process. The majority opinion in the Florida Supreme Court decision, although affirming petitioner's conviction and sentence, recognized that "...the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility...." Darden v. State, 329 So.2d 290 (Fla. 1976). Respondent's Supplemental Answer, at page 12, recites that "No one has ever even weakly-suggested that McDaniel's closing remarks were anything but improper...." (4)

The improper statements of the prosecution can be placed in four general categories:

(1) statements by the prosecution attempting to try petitioner for "offenses" of the State Division of Corrections;

(2) statements of the prosecution seeking to prejudice the jurors by improperly appealing to their emotions;

(3) statements of the prosecution which improperly placed the prosecutors' personal credibility in issue;

(4) other forms of improper argument.

THE OBJECTIONAL ARGUMENT

I

As examples of statements by the prosecution attempting to try petitioner for "offenses" of the State Division of

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Corrections, the record discloses the following excerpts from the prosecutor's jury argument:

> As far as I am concerned, there should be another Defendant in this courtroom... and that is the division of corrections, the prisons. (T. 749)
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> * * *
>
> As far as I am concerned...this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking? (T. 749)
>
> * * *
>
> I wish that person or persons responsible for him on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it. I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold]. Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. (T. 750-751)
>
> Mr Turman is dead because that unknown defendand we don't have in the courtroom allowed it. He is criminally negligent for allowing it. (T. 752)
>
> * * *
>
> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections. (T. 764)
>
> * * * *
>
> I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you. (T. 782)

The prosecutor, Mr. McDaniel, engaged in a line of argument to draw the jury's attention to an issue wholly immaterial to the determination of petitioner's guilt or innocence, as exemplified by the following comments:

> That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose--this man served his time and if this man served his time as the Court has sentenced him,

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> that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes--not home, strike that, excuse me--go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend. (T. 733-734)

II

Statements of the prosecution seeking to prejudice the jurors by improperly appealing to their emotions include the following:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [petitioner] sitting here with no face, blown away by a shotgun but he didn't....I wish someone had walked in the back door and blown his head off at that point. (T. 758-759)

Mr. McDaniel returned to this theme when he described the five times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Darden] didn't get a chance to use it. I wish he had used it on himself." (T. 774) He made a similar comment in describing Petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (T. 775) Finally, while discussing the claim that Petitioner had changed his appearance between the date of the crime and that of the trial, Mr. McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat." (T. 779) An additional comment in the same vein occurs at T.775, when the prosecutor stated "And Darden saved one [bullet]. Again I wish he had used it on himself."

III

The personal credibility of the prosecutors was placed in issue through comments such as these:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. (T. 748)

Mr. McDaniel, the lead counsel for the prosecution, repeatedly offered the jury his opinion that Petitioner was not a man worthy of belief. Since Petitioner's defense consisted

largely of his own alibi testimony, the prejudice from such remarks is manifest.

Petitioner testified that he had asked for the lie detector test. In discussing that testimony, Mr. McDaniel said: "I don't believe anything he says..." (T. 770) Petitioner testified that his alibi was the truth. Mr. McDaniel attacked this testimony in the following way: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out;" (T. 755) and "The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time." (T. 755-756) This was an obvious reference to Petitioner.

Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. Mr. Daniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week." (T. 769) Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance-- testimony that was confirmed by one of the state's own witnesses. Yet Mr. McDaniel discounted Darden's testimony and said: "That's what he says. I don't know that he stopped at any....I guarantee you he was not going back to the scene of the accident until he had gotten home." (T.777-778) In addition to telling the jury that he thought Petitioner a liar, Mr. McDaniel also suggested in a thinly veiled way that he knew of other instances where Petitioner had shot people: "Darden doesn't like people who move after he shoots them in the mouth." (T. 761)

IV

Other improper forms of argument were presented by the prosecution before the jury. Mr. McDaniel began his argument by telling the jury in effect that it should pay no attention to the argument of defense counsel that would follow because all defense lawyers always made the same arguments:

> Now [defense counsel] and I am positive, and I assure you and I guarantee you that [defense counsel] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because has notes I gave him many years ago. (T. 749)

Mr. McDaniel discussed Petitioner's statement that he would take a lie detector test if his attorney were present. Mr. McDaniel told the jury:

> Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that. (T. 770)

Mr. McDaniel also made repeated references to aspects of Petitioner's conduct while on weekend furlough from prison that were entirely unrelated to the offenses with which he was charged. (T. 751,763,766)

Throughout the entire closing arguments of both prosecution attorneys, only two objections were ever raised by defense counsel. The first occurred when the prosecution suggested that Petitioner's girl friend, knowing that he was a criminal, allowed him to bring a gun into her house while he was on weekend furlough. (T 751). No specific ruling was made on the objection, but the comment was not stricken. The second objection raised by defense counsel was in response to the prosecution's comment that the only thing Petitioner had not done to alter his appearance was to cut his throat. (T.779) Defense counsel noted that it was the fifth time the prosecution had commented that he wished someone would have shot Petitioner, or that Petitioner would have killed himself. The court overruled the objection. (T. 780)

In Darden v. State, 329 So.2d 287 (Fla. 1976), the

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Supreme Court of Florida considered Petitioner's contention that remarks made by the assistant state attorneys during closing arguments were so prejudicial to his cause as to require the granting of a new trial. After a thorough examination and evaluation of the language being complained of by Petitioner, the Court concluded, however, that when the "totality of the record" was considered, the remarks of the Prosecutor amounted to harmless error.

STANDARD OF REVIEW

In a leading case on the question of whether a federal prosecutor's courtroom statements violated a defendant's right to due process or constituted prejudicial error depriving him of a fair trial. Berger v. United States, 295 US 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), the Supreme Court of the United States said:

> The United States-Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger at 88.

The much later case of Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974), involved a federal habeas corpus proceeding brought by a state prisoner who alleged that the statements of the prosecutor during his state court trial violated the due process clause of the Fourteenth Amendment. The Supreme Court indicated that the scope of review in such a case would be the narrow one of due process "and not the broad exercise of supervisory power that it would possess in regard to its own trial court." Donnelly at 642. In determining that Petitioner had shown no prejudice amounting to a denial of constitutional due process, the Court took note that the

challenged statements constituted only a brief moment in the prosecutor's long argument, that there was neither the introduction of specific misleading evidence important to the prosecution's case in chief nor the nondisclosure of specific evidence valuable to the accused's defense and that the trial court, on the defendant's request, had instructed the jury to disregard the prosecutor's statement.

In addition, several other factors have been considered by the Supreme Court in evaluating whether a prosecutor's remarks made to, or in the presence of the jury, have constituted prejudicial error in depriving a defendant of due process, or his right to a fair trial. These considerations include the relative strength of the government's case against the defendant, whether the prosecutor's remarks were made in response to defense counsel's statements to the jury, whether defense counsel raised any objection to the complained of remarks, the prosecutor's intent and whether the prosecutor retracted the remarks.

BRIEF EPISODE OR PERSISTENT ERROR

In determining whether a prosecutor's statements in his argument to the jury constituted prejudicial error, the courts have taken note of whether the statements were but a brief episode in a long summation or whether the statements were repeatedly made. In United States v. Socony-Vacuum Oil Co., 310 US 150, 60 S.Ct. 811, 84 L.Ed. 1421 (1940), the Court found that although the statements of the prosecution were improper, they were "minor aberrations in a pro[illegible]aged trial and not cumulative evidence of a proceeding dominated by passion and prejudice." Socony-Vacuum at 240, and did not constitute prejudicial error.

Likewise, in Donnelly v. DeChristoforo, supra, the Court reasoned that the prosecutor's comment "was but one moment in an extended trial." Donnelly at 643, and did not violate the Defendant's right to due process. The same reasoning was followed by the Fifth Circuit Court of Appeals in Alvarez v. Estelle,

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511 F.2d 1319 (5th Cir. 1976), when it found that the single remark of the prosecution, when considered in the context of the entire trial, did not render the proceedings fundamentally unfair.

On the other hand, in circumstances where the prosecution's misconduct was pronounced and persistent, the courts have found that such comments had a probable cumulative effect on the jury, and thus resulted in prejudicial error. Berger v. United States, supra; Houston v. Estelle, 569 F. 2d 372 (5th Cir. 1978).

Two recent Fifth Circuit Court of Appeals cases, Cronnon v. Alabama, 587 F.2d 246 (5th Cir. 1979); and Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980) merely mention the repeated comments of the prosecution in passing. Although factually distinct from each other, the court concluded in each case that the petitioner had not been denied due process.

II.

MISLEADING ARGUMENT OR FAIR SUMMARY

The courts have examined complained of prosecutorial statements to determine whether these statements amounted to the introduction of specific misleading evidence important to the prosecution's case in chief or the nondisclosure of specific evidence valuable to the accused's defense. In cases where the courts have found that neither of the above occurred, the courts have concluded that no denial of due process occurred. Donnelly, supra; Cobb, supra.

Conversely, when the courts found that the prosecutor had misstated facts, put words into the mouths of witnesses, cross-examined witnesses after deliberately misconstruing their testimony, assumed prejudicial facts not in evidence, Berger, supra, knowingly misled the jury and court about the significance of crucial evidence, Miller v. Pate, 386 US 1, 87 S.Ct. 785, 17 L.Ed. 2d 609 (1967), and implied that a defendant in a drug case was giving out names of drug traffickers to his attorney during the course of the trial, United States v. Corona, 551 F. 2d 1387 (5th Cir.1977),

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the courts found that the substantial rights of the defendant were prejudiced.

III

PERSONAL OPINION OR OPINION BASED ON EVIDENCE

In cases in which the prosecutor's remarks were found to have been made in response to the defense counsel's statements to the jury, it was determined that the prosecutor's statements to the jury did not violate the defendant's right to due process. In Socony-Vacuum, supra, the Supreme Court rejected the defendant's contentions that various statements of the prosecutor about his belief in the defendant's guilt and the government's desire for a conviction, constituted prejudicial error. The Court ruled that the statements were not prejudicial since the statements concerning the Government's wish to have the defendants convicted were made in response to defense counsel's repeated statements to the jury as to the knowledge and acquiescence by government officials in the defendants' conduct. Socony-Vacuum, at 241-242.

In Del Cristo v. United States, 327 F.2d 208 (5th Cir. 1964), the court found that the defendant was not denied a fair trial because the prosecutor in his summation to the jury said he believed the defendant to be guilty. The court determined that the argument of the defense that the prosecuting attorney did not believe that the defendant was guilty, but was merely doing his job, had provoked the retort from the prosecutor concerning his belief in the guilt of the defendant.

IV

PURPOSEFUL AND FLAGRANT OR FAIR COMMENT

In reviewing whether a prosecutor's courtroom remarks constituted prejudicial error, the courts have given consideration to whether the prosecutor's conduct was either purposeful or flagrant. Singer v. United States, 380 US 24, 85 S.Ct. 783, 13 L.Ed 2d 630 (1964). In Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973), the court found that the prosecution's inaccurate suggestion that the defendant would be free to walk the streets if the jury found him unable to stand trial, was deliberate and

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calculated to influence the jury in its decision making. Bruce at 1040. Accordingly, the court concluded that the defendant's right to a fair hearing on the merits of the case had been infringed upon.

Similarly, in Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975), the Court found that the prosecuting attorney's statement to the effect that perhaps the next time the victim wouldn't be "a little black girl from the other side of the tracks; maybe it will be somebody that you know," constituted a highly inflammatory and wholly impermissible appeal to racial prejudice. Likewise, the court found that:

> The district attorney's peroration that 'If you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home...' was not only a highly improper expression of personal opinion but constituted a veiled threat to the jury to return a guilty verdict. Kelly at 19.

The Court concluded that the cumulative effect to these improper comments and inflammatory statements made by the prosecuting attorney during argument to the jury operated to deny the black defendant a fair trial on rape charges.

V

WEAK CASE OR STRONG CASE

In determining whether improper remarks made by the prosecution constituted prejudicial or reversible error, one of the factors considered by the courts has been the relative strength of the case against the defendant. A review of relevant cases indicates that prejudice to the defendant was found when the case was a "weak" one as opposed to a "strong" one.

In Berger, supra, in reversing the defendant's conviction, the Court in evaluating the prosecuter's statements, noted that the case against the defendant was not strong, but might "properly be characterized as weak," and "in these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." Berger at 89. On the other hand, in Socony-Vacuum, supra, the strength of

the government's case was one of the factors relied on by the Supreme Court in holding that the prosecutor's remarks, although improper, did not constitute prejudicial error. Socony-Vacuum at 299. The Court distinguished the decision in Berger, supra, in which the case against the defendant had been weak. Id.

In its opinion in Cronnon, supra, the Fifth Circuit Court of Appeals noted that although the language used by the prosecutor was strong, it was completely in accord with the evidence in the case. Cronnon at 251. Additionally, the concurring opinion took note of the fact that "the proof against the defendant was overwhelming." Id. at 252. And, in Cobb, supra, the Fifth Circuit found:

> Given the circumstances of this case, we conclude, and our conclusion is made easier by the strength of the evidence against Cobb, that no prejudice amounting to such a denial of constitutional due process was shown, Cobb at 756. (Emphasis added)

VI

OBJECTION MADE OR FAILURE TO OBJECT

A factor sometimes considered when the prejudicial or nonprejudicial effect of a prosecutor's comments is determined is whether an objection was made to the comments by defense counsel. In Berger, supra, Corona, supra, and Houston, supra, where the prosecution had made several comments which were objected to by the defense, the respective courts found that the defendants' rights had been prejudiced.

In Cronnon, supra, the court found that the Petitioner had not suffered a deprivation of due process. The concurring opinion points out that no objection was made to the prosecutor's closing argument. Cronnon at 252.

VII

Various courts have considered the effect of curative instructions sought by defense counsel as the result of improper comments of the prosecutor. In Socony-Vacuum, supra, and Donnelly, supra, it was held that under the particular facts obtaining (in each case the comment of the prosecutor was deemed to be but an isolated comment), the prosecutor's courtroom remark

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did not constitute a violation of the defendant's right to due process.

However, when the prosecutor has engaged in persistent and pronounced misconduct, the courts have indicated that instructions by the trial court directing the jury to disregard the prosecutor's improper remarks, were not sufficient to cure the error. Berger, supra; Houston, supra.

VIII

REMARKS WITHDRAWN, CURRATIVE INSTRUCTIONS

In Socony Vacuum, supra, where the defendant's conviction was upheld, one of the factors relied on by the Supreme Court in holding that the prosecutor's remarks to the jury did not cohstitute prejudicial error was that the prosecuter withdraw his remarks after the defendant had objected thereto. Socony-Vacuum at 242. And in United States v. Rodriguez, 585 F. 2d 1234 (5th Cir. 1978), the Fifth Circuit noted that the jury instructions given by the court may be considered as a factor in assessing the degree of prejudice sustained by a defendant because of improper comments by the prosecution. Rodriguez at 1244.

IX

The above enumerated specific factors have been considered by the Supreme Court and the Fifth Circuit Court of Appeals in evaluating whether a prosecutor's remarks made to, or in the presence of the jury, have constituted prejudicial error depriving a defendant of due process, or his right to a fair trial. The Supreme Court has given specific guidelines to be applied in arriving at a proper determination of the prejudicial effect on the jury, if any, resulting from trial errors.

The methodology for determining if the effect of trial errors on the trial jury was harmless or prevented defendant from receiving a fair and impartial trial is found in Kottekos v. United States, 328 US 750 (1945).

> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what

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has been done in similar situations. Cf. United States v. Socony-Vacuum Oil Co., supra, at 240-242. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. Kotteakos, at 762.

* * *

Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus, it is not the appellate court's function to determine guilt or innocence. Weiler v. United States, supra, at 611; Bollenbach v. United States, 326 US 607, 613-614. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error. Weiler v. United States, supra, Bollenbach v. United States, supra.

But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. United States v. Socony-Vacuum Oil Co., supra, at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. United States v. Socony-Vacuum Oil Co., supra, at 239, 242; Bollenbach v. United States, supra, 614.

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm, or a specific command of Congress. Bruno v. United States, supra, at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. Kotteakos, at 763-765. (Footnotes deleted, emphasis added)

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The Kotteakos "harmless error" test was cited in a Fifth Circuit opinion determining that prosecutorial misconduct denied defendant a fair trial in United States v. Haynes, 466 F.2d 1260 (5th Cir. 1972) and forms the basis for the "harmless error" constitutional rule announced in Chapman v. California, 386 U.S. 181 (1967). Chapman rejects any "overwhelming evidence" test.

SUMMARY

The Darden trial jury was subjected to numerous instances of prejudicial prosecutorial argument as above detailed. The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eye-witness testimony of the victims. All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony. Defense counsel's objection to the prosecutor's argument was late and tentative. The trial judge overruled the objection thereby making it appear that the argument could be properly considered by the jury.

The question which then must be asked is: In the context of the entire trial did the prosecutor's improper arguments either have a substantial influence on the jury's determination of guilt, or is there grave doubt about what influence the argument did have on the jury? Petitioner's trial counsel put in issue the credibility of the victims' identification by cross-examination and proper jury argument. Darden's testimony at trial included a denial of the offenses of an alibi, testimony which "appeared on its face to be sincerity." (Trial Judge's Findings of Fact For Sentence.)

In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. I am convinced that the jury deliberation was substantially

influenced by the improper argument and that the jury was prejudiced against Darden by the argument. The State has failed to demonstrate,beyond a reasonable doubt, that the prosecutor's comments did not contribute to Darden's convictions, a burden mandated by Chapman v. California, supra. The argument was so egregious that the trial judge should have reprimanded the prosecutor and instructed the jury to disregard the improper remarks, even without objection of the defense counsel. The one effective objection was overruled and the judge thereby magnified the prejudice, leading the jury to believe that it was proper to consider the prosecutor's argument in determining the verdict. The horrible, heinous, repulsive nature of the crimes involved does not expiate the prejudicial effect of the prosecutors' argument in this case. To hold otherwise would eliminate any prosecutorial restraint and deny a defendant, in a case like the present one, a fair trial on a presumption that any prosecutorial misconduct, however egregious, is harmless where the crime is shocking and there would be sufficient evidence to convict if the misconduct had not occurred. The errors here were not harmless when viewed in light of the teachings of Kotteakos and Chapman, supra.

Although the Florida trial judge imposes the death penalty, and may do so notwithstanding a jury recommendation of life imprisonment, the jury recommendation is given great weight. In order to impose the death penalty following a recommendation of life, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ...." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). See also: Burch v. State, 343 So. 2d 831, 834 (Fla. 1977). Darden was entitled to a fair trial on the issue of guilt and an equal measure of fairness at the sentencing phase, untainted by prejudicial argument of the prosecutor.

In making this recommendation, I am aware that the decision of the Florida Supreme Court in Darden v. State is due that deference required by Title 28 U.S.C. §2254 (d) as

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interpreted in Sumner v. Mata, ____ U.S. _____, 101 S.Ct. 764, 28 Cr.L. 3061, decided January 21, 1981. Section 2254 (d) relates to the factual determination made by the Florida court on appeal, which historical facts are not in dispute. Here and in that court the same record is reviewed. The ultimate determination of whether the prosecutor's prejudicial remarks denied petitioner a fair trial is a mixed question of fact and law. To the extent it is considered a factual determination, I conclude that the record, considered as a whole, does not fairly support a determination that Darden's trial was a fair trial. Considered as a determination of the appropriate legal resolution of the historical facts found, applying the federal constitutional standards herein set forth, I find that the Florida Supreme Court was in error in the fair trial standard it utilized and the results reached. That court summarized its standard for review as follows:

> "How is it possible to use language which is fair comment about these crimes without shocking the feelings of any normal person? The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes." Darden v. State, 329 So. 2d 329, 290.

The answer, of course, is that even a person charged with the most heinous crimes is entitled to a fair trial, not a perfect trial but a fair trial.

> We are mindful of the fact that federal courts do not sit as courts of errors and appeals when a state prisoner seeks federal habeas corpus. At the same time, we cannot ignore our responsibility to insure that an accused obtains a fair trial by an impartial jury. As the Supreme Court has reiterated time and time again, "[e]xercise of calm and informed judgment by . . .[a jury's] members is essential to proper enforcement of law." Highly prejudiced remarks uttered by the prosecutor jeopardize the jury's deliberative process and hence infringe upon an accused's right to a fair hearing on the merits of the case. Bruce v. Estelle, 483 F.2d 1031, 1040 (5th Cir. 1973). (Footnotes deleted.)

The prosecutor struck foul blows, and there is grave doubt that the jury was not influenced by these foul blows. Accordingly, I find that Petitioner was denied his right to due process.

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MISCELLANEOUS DEATH PENALTY CLAIMS

Most of Petitioner's additional claims, asserted after the filing of the original petition in this cause, relate to the application of the death penalty statute, Florida Statutes §921.141. Except as otherwise specifically treated in this report and recommendation, the claims asserted lack sufficient merit to afford Petitioner habeas relief.

Petitioner's contentions that excessive punishment, cruel and unusual punishment, discrimination in punishment related to race, poverty, and fundamental unfairness mitigate against imposition of the death penalty are issues settled against Petitioner in Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978) and Proffitt v. Florida, 428 U.S. 242 (1976).

Arbitrary sexual, racial and poverty related patterns of sentencing are alleged by Petitioner, but no proof was offered to support these contentions. In an opinion striking down the Massachusetts death penalty statute, the Supreme Judicial Court of that state recites that "The criminal homicide data from the date of the post-Furman statutes through 1977 indicate... [that] (i)n Florida, of 286 blacks who had killed whites, forty-eight (16.8%) were sentenced to death; of 111 whites who killed blacks, none were sentenced to death." District Attorney v. Watson, Mass. Sup. Jud. Ct., 10/28/80, 28 Cr.L 2172. Petitioner, in the instant case, has failed to establish any such statistics showing a suspect pattern of sentencing. In any event, it is doubtful that such statistics, standing alone, would warrant habeas relief without a review of each case included in the statistical summary.

CLEMENCY PROCEEDINGS

Petitioner claims that he was denied due process in relation to the clemency proceedings. Whatever procedure Petitioner may suggest is unfair, irregular or arbitrary, there has been no showing of prejudice to Petitioner in the clemency proceedings. Nor is there any proof that Petitioner's poverty denied him an

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equal opportunity to establish that he was denied an opportunity for commutative relief or opportunity to establish that he was legally incompetent to be put to death."

I find no legal authority contrary to Justice England's concurring opinion in Sullivan v. Askew, 348 So.2d 312, 316-319 (Fla. 1977), wherein England stated:

> Nothing yet said by the United States Supreme Court suggests that the discretionary decision whether or not to allow a judicially approved death sentence is subject to the same due process strictures as are required for any judicial process employed to impose such a sentence. ...further ...I would not engraft these due process requirements on the clemency powers conferred in Florida's Constitution... Sullivan at 319.

DEATH PENALTY REVIEW

In Tedder v. State, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court gave assurance that it would review all death penalty cases to assure an even-handed application of the death penalty and to insure that the death sentence would not be "wantonly" and "freakishly" imposed.. That assurance was accepted by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), as satisfying the requirement that the Florida death penalty statute would be applied in a non-discriminatory fashion and not in an arbitrary or capricious manner.

The Florida Supreme Court performs this review function by comparing the facts and circumstances of each case with those of other cases in which the death penalty is imposed. Malloy v. State, 382 So. 2d 1190 (Fla. 1979) For a detailed discussion of the procedure followed by the Florida Supreme Court, see: Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Pursuant to the provisions of 28 USC, Supreme Court Rule 22, Petitioners have until mid-April, 1981 in which to file a petition for writ of certiorari to the Supreme Court of the United States. An example of the Florida Courts' difficulty in performance of this task is evident in the dissenting opinion in Malloy v. State, supra, at 1193. See also: Concurring Opinion in Godfrey v. Georgia, ___U.S.____, 100 S.Ct. 1759, 1980. Performance of the review function by the Florida Supreme

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Court was criticized by Justice Marshall in the dissenting opinion in Gardner v. Florida, 430 U.S. 349, 365 (1976), in which he stated that "the blatant disregard exhibited by the (Florida) courts below for the standards devised to regulate imposition of the death penalty calls into question the very basis for this Court's approval of that system in Proffitt." The majority, however, excused the Florida Court's review performance because Proffitt and Tedder were decided after the Florida Supreme Court Gardner decision. Gardner, supra, 361 n.12.

Petitioner claims that the review function performed by the Florida Supreme Court does not "assure that the death penalty will not be imposed in an arbitrary or capricious manner" as required in Proffitt, supra. In support of this claim, Petitioner, on November 15, 1979, filed an affidavit of the Clerk of the Florida Supreme Court, establishing that the Florida Supreme Court does not take into consideration sentencing factors in those capital trials which result in life imprisonment rather than the death penalty. A contention that such cases should be included in the review process was raised and rejected in Proffitt, supra, 259 n.16. Petitioner has submitted no proof other than this affidavit, and in light of the precedent of Proffitt, this claim must be denied.

THE WITHERSPOON PROBLEM

Petitioner alleges that the jury which convicted him and recommended the death penalty failed to include a true cross-section of the community because prospective jurors were improperly excluded based solely on their religious or conscientious scruples against the death penalty, in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968).

Five veniremen were excused for cause: Mr. Varney, Mr. Mays, Ms. Carn, Ms. Maher and Mr. Murphy. Each was excused for cause after expressing his opposition to the death penalty. It is now clear that exclusion of even one venireman on grounds at variance with the Witherspoon standard will void the death sentence even though the state may have one or more unexercised preemptory challenges. Burns v. Estelle, 592 F.2d 1297 (5th Cir.

1979); 626 F.2d 396, (5th Cir. 1980); Alderman v. Austin, 498 F.Supp. 1134 (S.D. Ga. 1980); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, ____U.S. _____, 100 S.Ct. 1521 (1980). A general inquiry into personal, conscientious scruples against capital punishment cannot form a permissible basis for exclusion from a jury deliberating the life or death fate of another human being.

> It cannot be assumed that a juror who describes himself as having 'conscientous or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' thereby affirms that he could never vote in favor of it or that he would not consider doing so in a case before him . . . Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed. Witherspoon v. Illinois, 391 U.S. 510, at 515 n.9 (citations omitted).

Such exclusions are constitutionally permissible only if veniremen make

> "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 522-23 n.21 (emphasis in original), reiterated in Adams, 100 S.Ct. at 2525 and Burns, 626 F.2d at 398.

We need to go no further than to review the voir dire examination of Mr. Varney and Mr. Murphy to see that at least two prospective jurors were excused for holding views about capital punishment not shown to be sufficiently unbending to meet the standards of Witherspoon.

On the issue of prejudice against the death penalty the trial judge's cursory examination of Mr. Varney follows:

> THE COURT: All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence? (Emphasis added)
>
> MRS. MACY: No, sir.
>
> THE COURT: Do you, Mr. Blankenship?

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MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No sir.

MR. VARNEY: Yes sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would. (Emphasis added)

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service. (T. 44-45)

Mr. Murphy's examination was nearly as abbreviated as Mr. Varney's. The equivocal question to Murphy evoked an equivocal answer. The following colloquoy ensued with juror Murphy:

CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pius, Uniondale, New York.

THE COURT: Do you have any moral or religious,

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conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts? (Emphasis added.)

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

CLERK: Cecelia Clark Mulroy. Number 85.

THE COURT: Mrs. Horne, you will note the defendant object (sic) to him being excused for cause. (T.165)

The fact that Mr. Varney "believed" that he would "unwilling" or "unable" to recommend the death penalty because of his conscientious beliefs does not foreclose the possibility that despite his expressed convictions he could put his disbelief or unwillingness aside and do his duty as a citizen. His answer might have been that he could. Unfortunately, as in Davis v. Georgia, supra, the hard question was not asked. Likewise, Mr. Murphy's expression of moral, conscientious or religious principles which would be violated by recommending capital punishment does not foreclose the same possibility that he could put aside these principles and do his duty as a citizen. These responses failed to demonstrate "unambiguously," Witherspoon, 391 U.S. at 516 n.9, or "unmistakably," 391 U.S. at 522 n.21 that Varney and Murphy would have automatically voted against a recommendation of capital punishment, or that they would not make an impartial decision as to the guilt or innocence of Petitioner. The beliefs about capital punishment expressed by these two veniremen would not necessarily lead them to "ignore the law or violate their oaths." Adams v. Texas, supra. More was required than these tentative, initial, expressions of doubt as to their ability to recommend the death penalty in order to make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any

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evidence that might be developed. Their excusal was erroneous under Witherspoon, Burns and Adams, supra.

Respondent, in a one sentence argument, contends that Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) and/or Proffitt v. Florida, 428 U.S. 242, included claims identical to Petitioner's Witherspoon claim and that the claim was rejected in those cases. (Respondent's Supplemental Memorandum of Law, page 4.) Spinkellink, supra at 592 cites voir dire examination of two excluded veniremen who both stated unambiguously that they could fairly judge Spinkellink's guilt but made it unmistakenly clear that they would automatically vote against the imposition of capital punishment without regard to the evidence. Although the reported decision in Spinkellink, supra, at page 592, recites that the transcript of the voir dire examination of the two excluded veniremen is "set forth in Appendix A," that appendix is not included in the published decision. I have reviewed that transcript. A reading of the Spinkellink jury voir dire examination reveals that two veniremen, excluded for cause, Mr. Ferrell and Mr. Colson, were clear and unambiguous in their determination not to impose the death penalty under any circumstances. Another venireman, Mr. Minatee, although initially expressing opposition to the death penalty was ultimately seated on the jury after further examination established that he could and would vote for capital punishment in a proper case. With that record before the Spinkellink court it was clearly no violation of Witherspoon to exclude the two veniremen for cause. In Proffitt, supra, the Supreme Court did not address any Witherspoon claim. Neither case cited by the Respondent represents authority for rejection of Petitioner's Witherspoon claim.

Witherspoon and the related cases discussed above establish a basis for vacating the death sentence but none of these decisions suggests that the conviction must also fall. To the contrary, the Witherspoon opinion, where half of the panel had been excused because of their opposition to capital punishment, expressly refuses to vacate the conviction. See also:

Burns, supra; Alderman, supra; and Brown v. Estelle, supra. In the instant case Petitioner has made no claim that the Witherspoon violation should result in vacation of the jury's verdict of guilt, but Witherspoon requires vacation of the death penalty.

ASSISTANCE OF COUNSEL

In further support of his application for habeas corpus relief, Petitioner WILLIE JASPER DARDEN alleges as one of his claims that the assistance of court appointed defense counsel was so ineffective as to deny him the due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States and to deny him his right to counsel as guaranteed by the Sixth Amendment of the Constitution of the United States. Petitioner has enumerated twenty-seven factual contentions as the basis for this claim.

A. REVIEW STANDARDS

There is a presumption that counsel has rendered legally effective assistance. Thomas v. Wyrick, 535 F.2d 413 (8th Cir.) cert. den. 97 S.Ct. 178, 429 US 868, 50 L.Ed. 2d 148 (1976). A habeas corpus petitioner challenging the effectiveness of the assistance of his counsel has the burden of establishing that the performance of his counsel fell below the acceptable standards. Id.

The Sixth Amendment of the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right, to have the Assistance of Counsel for his defence." In Powell v. Alabama, 53 S.Ct. 55, 287 US 45 (1932), with specific reference to capital cases, the Court indicated that this Constitutional guarantee contemplated "effective" counsel.

A leading Fifth Circuit case on what constitutes "effective" counsel is MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960). In that case, the court said:

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"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna at 599.

[See also United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978); Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980)].

In the recent case of Knight v. Florida, ____So.2d ____, Opinion of February 24, 1981, the Supreme Court of Florida adopted the following four principles as a standard to determine whether an attorney has provided reasonably effective assistance to his client:

"First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.

Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurable below that of competent counsel...

Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings...

Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact..."

At the time the petition for habeas corpus relief was filed in the instant case, the Fifth Circuit Court of Appeals used two distinct criteria in evaluating the effectiveness of assistance rendered by retained as opposed to appointed counsel. [See: Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974)]. The recent decision of the Supreme Court of the United States in Cuyler v. Sullivan, 100 S.Ct. 1708, 446 US 335, 64 L.Ed. 2d 333 (1980), mandates that courts shall not use two distinct criteria in evaluating the effectiveness of assistance rendered by retained as opposed to appointed counsel. The Supreme Court stopped short

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of articulating what standard should now be used in determining whether counsel had been effective.

In the recent case of Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981), the Fifth Circuit Court of Appeals adopted the following guidelines in determining whether the requirement of effective assistance of counsel has been met.

> " 'This Circuit has been strict in its requirement of the effective assistance of counsel. Effective counsel does not mean 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' This necessarily 'involves an inquiry into the actual performance of counsel in conducting the defense...based on the totality of the circumstances and the entire record.' Consequently, '[o]ne may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery.' " Beavers, supra, 115.

A review of defense counsel's pre-trial preparation and the handling of the trial itself indicates that notwithstanding Petitioner's claim to the contrary, defense counsels' assistance was not ineffective when measured by the test articulated in MacKenna v. Ellis, supra. Petitioner's claims concerning line-up, preliminary hearing, psychiatric examination, psychiatric evaluation, fingerprint evidence, continuance of November 1, 1973, dismissal of appointed counsel, change of venue, search and seizure, summoning of witnesses, sundry remarks of the court, motion to strike the jury panel, failure to object to the introduction of testimony, identification testimony, and miscellaneous other alleged failings of his defense counsel, even when viewed with the clear vision of hindsight, do not meet Petitioner's burden of proof necessary to establish ineffective assistance of counsel.

Based on the totality of the record and considering all of the evidence before this Court, it is clear that Petitioner's trial counsel made a substantial effort to afford Petitioner a defense to the charges upon which Petitioner was convicted. At both the pre-trial and trial stages, counsel for the Petitioner was effective in investigating and trying the case and in protecting the rights of the defendant in a professional, competent fashion. The representation, to the extent it was not

perfect, in no way prejudiced Petitioner.

In light of other recommendations in this report, the only allegations of ineffective counsel made by Petitioner which will be analyzed in depth are his contentions that (1) his defense counsel failed to fully develop Petitioner's alibi defense and failed to call defense witnesses in support of Petitioner's alibi claim, and (2) defense counsel was ineffective because he failed to object to repeated prejudicial comments made by the prosecution during closing arguments. The state court trial transcript and the evidentiary hearing held in this court reveal the following facts.

ALIBI DEFENSE

Defendant claimed that he was not at the crime scene. The trial testimony of Mrs. Helen Turman indicated that the assailant entered her store between 5:30 and 6:00 P.M. (T 233),[1] and spent a total of 10 to 15 minutes in the store. (T 266). She further indicated that she called the telephone operator to report the crimes while the assailant was still in pursuit of her neighbor Phillip Arnold. (T 242, 243)

Both Edith Lee Hill (T 291) and Phillip Arnold (T 467) testified that they thought that the shooting occurred about 6:00 P.M. John Daniel Stone testified that he was almost involved in an accident around 6:00 P.M. with a car some miles from the crime scene. It was established that Petitioner was the driver. (T 308)

Petitioner testified that right around 6:00 P.M., after the accident, he was driven to a gas station in Plant City, Florida, trying there to locate a wrecker to tow the automobile which had been involved in the accident. (T 640) Mary Simmons testified, however, that she drove Petitioner, leaving from the scene of the accident at about 6:30 or 6:40 P.M. (T 331), that they spent about 10 to 15 minutes at the gas station in Plant City, and that the trip from the accident scene to Tampa, Florida took one hour. (T 338, 340)

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At the evidentiary hearing in this court, Jack Johnson, Esquire, and Raymond Goodwill, Esquire, testified concerning their research and investigation of Petitioner's alibi claim. Mr. Johnson testified that the last time anyone saw Petitioner prior to the automobile accident was around 5:25 P.M. (H 235). The Public Defenders believe that the crime had been committed between 6:00 and 6:15 P.M. (H 235) and the accident occurred between 6:15 and 6:30 P.M. (H 213) The call concerning the homocide was received by the Lakeland Police Department at 6:31 P.M. (H 235); the accident was reported to the Hillsborough County Police Department at 6:32 P.M. (H 239-240). Mr. Johnson indicated that it was the opinion of the defense that there was not a good alibi defense on behalf of Petitioner because of the gap of time between when he was last seen prior to the accident, and the time when the crime occurred. (H 232) Attempts to locate anyone who could verify Petitioner's testimony concerning the repair of his car's muffler had been unsuccessful. (H 237)

Mr. Goodwill indicated that Petitioner did not provide the defense with any information which could account for his presence from 5:30 to 6:35 PM; (H-291) Mr. Goodwill further indicated that the evidence which was available to the defense did not preclude Petitioner from having been the assailant. (H 291)

Both Mr. Johnson, (H 239-240), and Mr. Goodwill, (H 349) were aware that the accident report was phoned in from a lounge just across the highway from the scene of the accident by an individual named "Glen." Mr. Goodwill and the Public Defender's staff did not go to the lounge in an effort to identify and locate "Glen" (H 349-350) to determine the exact time when he phoned the police after the accident had occurred. The Petitioner has offered no proof that "Glen's" testimony was essential to establish his alibi.

With regard to defense counsels' decision to call Petitioner as the sole defense witness, Mr. Johnson testified that this decision was a calculated trial tactic, planned for the

purpose of giving defense counsel the final closing argument before the jury. (H 236) Having already concluded that there was no real valid alibi defense which could be made on behalf of Petitioner (H 236), defense counsel believed that presenting a poor alibi was worse than no alibi at all. (H 236)

FAILURE TO OBJECT

Defense counsel for Mr. Goodwill testified that it was a conscious, deliberate decision on his part not to object to the repeated, objectionable comments made by the prosecution in closing arguments. (H 333-334) Defense counsel testified that the prosecution "would get much more vehement in his remarks if you allowed him to go on, and we could always come back in with an objection later on in order to preserve it for the appeal purpose." (H 334)

In Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), the court recognized:

> ...the fact some other lawyer followed a different course in another case, or would have done differently had he been acting as counsel, is no ground for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. The practice of law is an art as well as a science. As no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight. Williams at 706.

The Fifth Circuit Court of Appeals has repeatedly recognized that the trial tactics and strategy of an attorney, even if judged to be in error in retrospect, do not constitute a denial of effective assistance of counsel. [Odom v. United States, 377 F.2d 853 (5th Cir. 1967); Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967); Lee v. Wainwright, 457 F. 2d 771 (5th Cir. 1972].

All of Petitioner's contentions regarding his ineffective counsel claims, including factors relavent to his alibi defense and the failure of the defense to object to the prosecution's closing argument, have been carefully considered. Evaluated in light of the cited cases, I find that Petitioner has failed to meet his burden of establishing ineffective assistance of counsel.

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CONCLUSION

Willie Jasper Darden has been denied a fair trial by jury in two ways. First, the Darden trial jury did not represent a fair cross section of the community by virtue of the exclusion of jurors inclined against the death penalty but not shown to be unqualified or unable to sit and recommend such penalty in a proper case. Secondly, the Darden jury was exhorted to convict and recommend the death penalty by emotional, irrelevant and prejudicial prosecutorial diatribes having no place in the dispassionate resolution of the question whether Darden was guilty and should receive the death penalty. Constitutional protections are not reserved for good people and denied to bad, nor does the right to a fair trial go by the board because the crimes charged are horrible to comprehend.

I recommend that habeas corpus relief be granted. If the prosecutorial argument claim is sustained Petitioner will be entitled to a new trial. If only the Witherspoon jury selection claim is sustained, Petitioner is entitled to vacation of the death sentence and imposition of a sentence of life imprisonment.

This 10th day of April, 1981, at Tampa, Florida.

PAUL GAME, JR.
UNITED STATES MAGISTRATE

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,

Petitioner-Appellant,
Cross-Respondent,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State
of Florida,

Respondent-Appellee,
Cross-Petitioner.

Appeals from the United States District Court
for the Middle District of Florida

(July 23, 1985)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

PER CURIAM:

Willie Jasper Darden was convicted of murder and sentenced to death in Florida. After exhausting his direct and collateral appeals in state court, he sought federal habeas corpus relief. The district court denied his petition. A panel of this court, considering and rejecting three constitutional claims, affirmed that denial, with one judge dissenting. Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983). Upon rehearing en banc, this court reversed, holding that the trial court's exclusion of one of the venirepersons from jury service was unconstitutional under Witherspoon v. Illinois, 391 U.S. 510 (1968). Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984) (en banc).

On February 19, 1985, the Supreme Court vacated this court's en banc decision and remanded the case for further consideration in light of Wainwright v. Witt, 469 U.S. __, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Having undertaken such a review under the standards announced in Witt, we conclude that Witt controls the juror exclusion issue in this case. Under the Witt standards, Darden is not entitled to habeas corpus relief. Accordingly, we

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C.A. § 46(c).

affirm the district court's denial of Darden's habeas corpus petition, and we reinstate the panel opinion, 699 F.2d 1031, as to all issues, except the juror exclusion issue.

The dissent maintains that the facts of Witt are distinguishable and concludes that the state trial judge's decision to exclude juror Murphy in this case violates the standards announced in Witt. The dissent would hold that the trial judge applied an erroneous legal standard. We disagree. In his question to juror Murphy, the trial judge asked: "Do you have any moral or . . . religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" The legal standard articulated in Witt provides that a prospective juror may be excluded if the trial court is left with the definite impression that the juror's views would prevent or substantially impair the performance of the juror's duties in accordance with the instructions and oath. Although the dissenting judges in this case properly point out that a juror with strong conscientious objections to the death penalty might well be able to lay aside those objections and follow the law, it is nevertheless true that the difficulties such a juror would experience in doing so might well rise to the level of a "substantial impairment" of his performance as a juror. Thus, although the question posed to juror Murphy may not have been ideal, we cannot conclude that it was inconsistent with the "substantial impairment" test articulated in Witt. Moreover, as the dissent readily acknowledges, the trial judge did

articulate an unquestionably correct legal standard on many other occasions during the voir dire. Thus, we must conclude, as did the Supreme Court in Witt, 469 U.S. at __, 83 L.Ed.2d at 856-57, that the state trial judge applied the correct legal standard.

Having concluded that the trial judge employed the correct legal standard, the voir dire record with respect to juror Murphy provides fair support for the trial judge's decision to exclude Murphy. In Witt, the Supreme Court held that there was fair support in the record to support the trial judge's decision to exclude juror Colby. The voir dire record with respect to Colby established merely that Colby thought that her personal beliefs would interfere with her sitting as a juror.

In this case, the voir dire record with respect to juror Murphy establishes that juror Murphy had moral or religious principles in opposition to the death penalty so strong that he would be unable to vote for the death penalty regardless of the facts without violating his principles. The dissent correctly points out that the record does not establish whether or not Murphy would have been able to lay aside his principles and follow the law. However, the voir dire record with respect to juror Colby in Witt contained the same flaw, i.e., the record was silent as to whether juror Colby could have laid aside her personal beliefs and followed the law. The record established merely that juror Colby's beliefs would interfere with her sitting as a juror. The Supreme Court in Witt held that that provided a sufficient factual basis for the trial judge's decision to exclude juror Colby. We cannot conclude that there

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is less factual support in this case. In other words, principles so strong that a juror would be unable without violating his principles to vote for the death penalty is at least as strong a factual basis for an exclusion decision as principles that would interfere with one's sitting as a juror.

The Supreme Court in Witt also relied upon two additional factors, the trial judge's opportunity to observe the juror's demeanor, and the lack of objection by defense counsel. Noting that defense counsel did not object to the exclusion of juror Colby, the Supreme Court suggested that no one in the courtroom questioned the fact that juror Colby's beliefs prevented her from sitting, and that, although not disclosed clearly on the record, it may have been readily apparent to those in the courtroom that she was properly disqualified. Similarly, in this case, the trial judge had the same opportunity to observe juror Murphy's demeanor, and Darden's trial counsel did not object to the exclusion of juror Murphy.

Thus, we conclude that Wainwright v. Witt compels the holding in this case that the voir dire record with respect to juror Murphy does constitute fair support for the trial judge's decision to exclude the juror.

AFFIRMED.

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TJOFLAT, Circuit Judge, specially concurring:

I agree with the court's decision to affirm the district court's denial of habeas corpus relief, though for different reasons. As I wrote in dissenting to our previous en banc disposition, Darden v. Wainwright, 725 F.2d 1526, 1533 (1984), the district court should have dismissed the habeas petition in this case because it contained several unexhausted claims. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 1203-05 (1982); Galtieri v. Wainwright, 582 F.2d 348, 354 (5th Cir. 1978) (en banc). As for the merits of petitioner's Witherspoon claim, assuming it to be properly before the court, I would reject the claim for want of a showing by petitioner of "cause" and "prejudice" under Wainwright v. Sykes, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508-09 (1977), since petitioner denied the Florida Supreme Court an opportunity to pass on it in reviewing his conviction and death sentence on appeal. Darden v. Wainwright, 725 F.2d at 1544-51 (Tjoflat, J., dissenting). Were I to consider four square the precise Witherspoon claim petitioner now presents to us, I would agree with the court that Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985), requires us to hold that the state trial judge did not violate the Constitution in excusing venireman Murphy for cause.

HILL, Circuit Judge, specially concurring:

I concur in the majority opinion.

My brother Clark finds my pre-Witt[1] observations to have been well taken. As a statement of what I perceived the law to have been when I wrote those passages, I do not unsay a word. I am, now, however, further instructed.

Witt is a major correction addressed to those of us who have accepted footnote 21 of Witherspoon[2] as command. Having consisted of dicta, then, it is held to be, now. Witt, 105 S. Ct. at 851. While we have lost our touchstone, to which I repaired, we are re-directed to the traditional test. Is the juror fair and impartial? See Witherspoon, 391 U. S. at 532-40 (Black, J., dissenting).

The remnant of Witherspoon seems to be this. A juror is no more disqualified because he or she is opposed to the death penalty than is one in favor of it. All are qualified, on this issue, who can apply the law -- including mitigation, aggravation, and other elements of capital punishment -- without bias in the case to be tried. "To hold that Witherspoon requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a

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1 Wainwright v. Witt, 105. S. Ct. 844 (1985).

2 Witherspoon v. Illinois, 391 U. S. 510, 522-23 (1968).

veniceman to sit despite the fact that he will be unable to view the case impartially." Witt, 105 S. Ct. at 851.

Whether released from or cast adrift from the criterion of footnote 21, I have no difficulty in concluding, as did the trial judge, that accepting venireman Murphy would have qualified one as a juror who was not impartial. Id. at 853-55.

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JOHNSON, Circuit Judge, dissenting:

The court holds that under the standards announced in Wainwright v. Witt, 105 S.Ct., 844 (1985) Willie Jasper Darden is not entitled to habeas corpus relief. Because Witt maintains constitutional limitations on the power of the State to exclude jurors opposed to capital punishment, limits that have been transgressed in this case, I respectfully dissent.

I. THE EXCLUSION

Willie Jasper Darden's trial for murder, robbery and attempted murder began in Florida state court on January 15, 1974, at 9:00 a.m. After all prospective jurors had been placed under oath, the trial court heard a motion in chambers. Darden's attorney moved to limit the voir dire examination of the State Attorney in order to foreclose any questioning regarding the venirepersons' views about capital punishment. In the course of denying this motion, the trial judge explained the conditions which would lead him to disqualify a juror for cause:

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause. (Emphasis sup-

plied

The court convened after the hearing in chambers and the prospective jurors were brought into the courtroom. After a reading of the indictment and a general explanation of capital sentencing procedures in Florida and the presumption of innocence, the court told the prospective jurors that twelve venirepersons would be called to sit in the jury box, at which time the court would "inquire of you [twelve] concerning your qualifications to serve on this particular case."

Twelve jurors were seated in the jury box. After some preliminary questions regarding the twelve jurors' knowledge of the case and their occupations, the court made the following statement:

> Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation?

The court proceeded to ask each of the twelve venirepersons a question similar to the one just described and excused two prospective jurors on the basis of their responses. Two more prospective jurors were seated and asked similar questions. The attorneys then questioned the twelve venirepersons as a group and individually before exercising several peremptory challenges. The process continued through the morning and resumed after lunch recess.[1]

At one point in the afternoon, venireperson Theodore

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Murphy was seated. After inquiring Mr. Murphy's occupation, the court asked him the following question: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" (emphasis supplied). Murphy replied "Yes" and was immediately excused.

The State Attorney and Darden's attorney ultimately accepted a panel of twelve jurors. During the selection of alternates, the court asked venireperson Adkins a question similar to the one asked of Murphy: "Do you hold such strong principles in opposition of the death penalty that you would be unable without violating them to recommend them, [sic] recommend a death penalty to the Court?" Adkins replied that he held no such principles and later was accepted as an alternate.

II. THE WAINWRIGHT V. WITT DECISION

The Constitution gives criminal defendants the right to an impartial jury. Consequently, it limits the power of the State to exclude persons from a jury in the trial of a capital crime; the State may not exclude prospective jurors simply because they oppose capital punishment. This limitation prevents the selection of a jury "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). Supreme Court and lower court precedent has until recently enforced this limitation through the use of a stringent standard of proof: jurors could not be excluded based on beliefs about capital

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punishment unless they made it "unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). See also Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Boulden v. Holman, 394 U.S. 478, 482 (1969); Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984)(en banc), vacated 105 S.Ct. 1158 (1985).

The Supreme Court's opinion in Wainwright v. Witt, 105 S.Ct. 844 (1985), does not denigrate the importance of an impartial jury. It maintains the limitations on the power of the State to exclude jurors opposed to capital punishment. The primary responsibility of a trial court, whether under Witherspoon or Witt, is to distinguish between "prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Id. at 850-51.

Witt does, however, modify and "clarify" the method a trial court should use in making this difficult determination of juror impartiality. Excludable jurors no longer have to indicate an "automatic" refusal to vote for the death penalty, nor must they indicate bias with "unmistakable clarity." The "simplified" standard requires that a prospective juror leave the trial court

with the definite impression that his or her views would "prevent or substantially impair the performance" of [illegible] in accordance with the instructions and oath. Id. at 850-51.

The Witt decision also affects the relevant appellate standard of review. The trial court's finding of juror bias is now subject to the "presumption of correctness" contained in 28 U.S.C.A. § 2254(d)(West 1977), because the predominant function of a trial court in determining juror bias "involves credibility findings whose basis cannot be easily discerned from an appellate record." Id. at 855. See Patton v. Yount, 104 S.Ct. 2885 (1984). Nevertheless, an appellate court must still review a finding of juror bias based on capital punishment beliefs in order to determine whether an exception to Section 2254(d) applies.[2] There are two exceptions relevant to this case.

III. FINDING NOT FAIRLY SUPPORTED BY THE RECORD

The state trial court in this case found that venireperson Murphy could not properly carry out his duties as a juror and excused him for cause. This factual determination, made after a hearing on the merits and evidenced by the written transcript of the voir dire proceedings, see Witt, 105 S.Ct. at 855-56, deserves a presumption of correctness unless Darden shows the applicability of one of the enumerated reasons for avoiding the presumption.

The presumption of correctness described in Section 2254(d) does not apply where an appellate court considering the record as a whole concludes that the record does not fairly

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support the factual determination of the state court. 28 U.S.C.A. § 2254(d) (West 1977). The Witt decision indicates one possible basis for invoking that exception in this case: a petitioner may show that the record does not fairly support a factual finding of bias based on capital punishment beliefs by demonstrating that the trial court did not apply the correct legal standard in determining whether to exclude venirepersons.

The petitioner in Witt contended that the record did not fairly support the trial court's finding of juror bias because the excluded juror, Colby, was the first one questioned and the record did not reveal whether the trial court applied the proper legal standard in excluding Colby. The Supreme Court rejected this argument because "where the record does not indicate the standard applied by a state trial judge, he is presumed to have applied the correct one" and because in Witt's case there was "every indication that the judge applied the correct standard." Witt, 105 S.Ct. at 856. Although the judge did not reveal the standard used to evaluate Colby's responses, on subsequent occasions during voir dire he asked jurors questions "entirely consistent" with the proper legal standard. There was no indication that the judge used different standards during the course of voir dire.

The Supreme Court implied throughout this discussion that if the record indicates the trial court evaluated a venireperson's qualifications under a legal standard inconsistent with the one set forth in Witt and Adams v. Texas, 448 U.S. 38 (1980), a finding of disqualifying bias would not be fairly

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supported by the record. Indeed, no other conclusion is possible. A factual finding made under the wrong legal standard lacks support because, even if a trial court correctly observes a juror's demeanor or correctly interprets the contextual meaning of different questions and answers, the court must ultimately evaluate these facts under a legal standard before making the final determination of juror disqualification. Even a judge with the best possible understanding of a juror's beliefs cannot reliably decide whether that juror is disqualified to serve if the judge does not understand the type of beliefs that could lead to disqualification. The choice of a legal standard governing jury impartiality is a separate question from whether any given juror meets the standard. Patton v. Yount, 81 L.Ed.2d 847, 858-59 n.12 (1984). An erroneous answer to the first question inevitably undermines the resolution of the second one. Cf. Bose Corp. v. Consumers Union, Inc., 104 S.Ct. 1949 (1984)(clearly erroneous standard inapplicable where lower court predicated its findings of fact on misunderstanding of governing rule of law).

The trial court in this case used an improper legal standard to determine whether Murphy and other venirepersons held beliefs about capital punishment that disqualified them to serve as jurors. The judge stated on the record that he intended to disqualify any prospective juror who showed that "he would be unwilling to follow the law [as instructed by the court] or if he did follow it, it would be going against his principles ..." (emphasis supplied). The standard applied by the trial judge in this case contains two possible grounds for disqualification:

(1) an outright unwillingness to follow the law or (2) a willingness to follow the law reached only after deciding to violate personal principles. This two-fold standard of disqualification operated throughout the voir dire. The court questioned some veniremembers regarding the first ground and others, such as Murphy and Adkins, regarding the second ground.

The two-fold standard unavoidably conflicts with the proper standard described in Witt. A juror may be excluded for his or her views on capital punishment only when the trial court has the definite impression that the juror's beliefs would prevent or substantially impair the performance of duties in accordance with the instructions and oath. A belief does not "substantially impair" the performance of duty simply because it leads the person to oppose capital punishment: Witt states that trial courts have to distinguish among all those jurors who oppose the death penalty and may exclude only those opponents who cannot perform their duties in spite of their philosophical beliefs. 105 S.Ct. at 850-51. The Witt standard maintains an "essential balance" between

> the right to a jury panel drawn from a "fair cross-section of the community"--which if carried to its logical conclusion would require that a juror be seated who frankly avowed that he could not and would not follow the judge's instructions on the law--[and] the traditional right of a party to challenge a juror for bias--which if carried to its logical extreme would permit exclusion from jury panels of groups of people whose general philosophical views might have no bearing on their ability to follow a judge's instructions.

Witt, 105 S.Ct. at 852 n.5. This balance was maintained in Witt

because the questions asked by the prosecutor and the answer given by venireperson Colby led the trial court to the reasonable conclusion that Colby's views about capital punishment would "interfere" with her ability to judge impartially the guilt or innocence of the defendant. The context of the questions and answers supported the trial court's conclusion that the term "interfere" was similar in meaning to "prevent or substantially impair." Colby was properly excluded because she had beliefs in opposition to capital punishment and because she positively indicated that those beliefs would prevent or substantially impair the performance of her duties as a juror.[3]

Philosophical views about capital punishment, standing alone, will not substantially impair a juror's performance of duty. The Witt opinion compels this conclusion, for if philosophical beliefs alone were treated as a substantial impairment of duty it would destroy the balance established in that case. According to Witherspoon and Witt, the Constitution prohibits a court from presuming that personal views regarding capital punishment will prevent a juror from conscientiously following the law, for some persons strongly opposed to capital punishment may nevertheless be able to follow the law when serving as jurors. Hence, personal views opposed to capital punishment must be accompanied by the additional belief that personal views in conflict with the law could or would not be put aside by a juror.[4]

The second ground for disqualification relied upon by the trial court in Darden's case excluded prospective jurors who

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expressed views about capital punishment but not about the circumstances under which they might ignore those personal beliefs. The court therefore used an incorrect legal standard to exclude venireperson Murphy. Its finding that Murphy was not legally qualified to serve on the jury is not fairly supported by the record as a whole. Hence, the presumption of correctness does not apply to this finding and Darden has proven that the exclusion of Murphy was incorrect, entitling him to habeas corpus relief.

IV. INADEQUATE DEVELOPMENT OF MATERIAL FACTS

The presumption of correctness also does not apply where the petitioner establishes "that the material facts were not adequately developed at the State court hearing." 28 U.S.C.A. § 2254(d)(3)(West 1977). Even if the trial court in Darden's case had been applying the proper legal standard to evaluate Murphy's qualifications, the presumption of correctness would still not apply because the court did not elicit sufficient information from Murphy upon which to base its finding of bias. Murphy's responses failed to give the court any evidence regarding at least one "material fact," namely, the relationship between his personal views and his ability to perform jury duty.

Murphy's ability to put aside personal beliefs regarding capital punishment was a material fact, crucial to the adequate consideration of Darden's constitutional claim. See Townsend v. Sain, 372 U.S. 293 (1963). As discussed in section III above, the trial court could not determine Murphy's qualifications

without finding out whether and to what extent he could override his personal beliefs about capital punishment when they conflicted with his duties as a juror.

The trial court never elicited this crucial information from Murphy, for the question asked of Murphy never touched on this fact. It asked only whetner Murphy held principles in opposition to the death penalty "so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts." This question asks whether the conflict between personal principle and jury duty holds true for every conceivable fact situation; in other words, it deals with the scope of the conflict without addressing Murphy's ability to resolve the conflict.

The court did ask other prospective jurors whether they could ignore their personal beliefs during the performance of their duties as jurors. In all likelihood, Murphy heard the court ask the others about this matter. Yet it would be unreasonable to conclude from this fact, as the State does, that when Murphy answered "yes" to a question about the content of his beliefs, he also meant to state that he was unable to override those beliefs. The court had addressed the earlier questions to persons seated in the jury box and not to the other prospective jurors in the courtroom. Murphy had reason to think that the court might ask him about his ability to subordinate personal belief to duty as a juror and he may even have considered what answer he would give. But the first question to Murphy asked only if he would have to violate personal principles in order to

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recommend a death sentence. He never had a chance to answer the second question as he might have expected. Because the court dismissed Murphy before asking about this matter, it failed to develop adequately a material fact.

The voir dire proceedings never revealed whether Murphy could override his personal views about the death penalty. This failure makes the presumption of correctness inapplicable to the trial court's finding of disqualification.[5] Moreover, by showing the lack of any evidence regarding Murphy's ability to override his personal beliefs, Darden has proven that the trial court was erroneous in its decision to exclude Murphy. He is entitled to habeas corpus relief.

V. CONCLUSION

The Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community gives the defendant an "inestimable safeguard" against the "corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). A fair cross-section of the community includes those "jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Wainwright v. Witt, 105 S.Ct. 844, 850-51 (1985). Wainwright v. Witt did not overrule the core meaning of Witherspoon v. Illinois and does not require this court to avert its attention when a petitioner claims that a state court violated his right to an impartial jury. Because the trial court in this case excluded

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a venireperson without determining that his views about capital punishment prevented or substantially impaired the performance of his duties as a juror, the district court improperly refused to grant habeas corpus relief. Accordingly, I dissent.

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[illegible] the early afternoon, veniremperson Mayo was asked, "Do you have any religious, moral, or conscientious principles against the death penalty or anything that they would make her unwilling to recommend the death penalty regardless of the evidence. Several moments later, the court asked, "Have I asked if you have any conscientious beliefs against the death penalty?" She replied positively and after several more questions from the attorneys, veniremperson Staha was seated. The court asked Staha the following question: "Do you have any opinions or principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of a death sentence regardless of what the facts might be?" Veniremperson Murphy was seated immediately after Staha.

[2]Appellate review may also serve other functions in cases of this sort, such as a determination of the precise factual finding made by the state court or an inquiry as to whether the presumption of correctness has been overcome by convincing evidence.

[3]The majority's confusion of these two types of beliefs leads it mistakenly to equate the positions of Colby and Murphy: "principles so strong that a juror would be unable without violating his principles to vote for the death penalty is at least as strong a factual basis for an exclusion decision as principles that would interfere with one's sitting as a juror." The flaw in this reasoning is plain. Colby stated that a conflict between belief and duty would interfere with performance of duty, while Murphy said only that a conflict would exist. The fact that a conflict exists between belief and duty tells a judge absolutely nothing about how the juror will react when faced with that conflict.

[4]There are reasons to think that this second type of conviction must be quite strong before it could disqualify a prospective juror. First, under Witherspoon, a veniremperson had to display an absolute unwillingness to ignore personal views in conflict with a juror's duty. Since the Witt court stated that it was adhering to the same essential balance of interests struck by the Witherspoon decision, 105 S.Ct. at 852 n.6, a very strong unwillingness to ignore personal views should be necessary. Second, the term "substantially" in the phrase "prevent or substantially impair" connotes some impairment of ability to perform duty approaching a complete impairment.

[5]This failure to develop the facts necessary to establish Murphy's inability to serve as an impartial juror could fall within the exception of Section 2254(d)(3), a failure to develop the material facts, or the exception of Section 2254(d)(8), a lack of fair support in the record.

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CLARK, Circuit Judge, dissenting:

I concur with Judge Johnson's dissent. I find compelling the following statement by Judge Hill in his special concurrence to our en banc court's reversal of the district court's denial of the writ of habeas corpus. 725 F.2d 1526 (11th Cir. 1984) (en banc):

> A conscientious trial judge must be bent upon determining if a prospective juror has such a mind set that he or she would refuse to vote for the death penalty regardless of the evidence in the case. That is fact-finding. "The state of a man's mind is as much a fact as the state of his digestion." Eddington v. Fitzmaurice, 29 Ch. 459, 483 (1885) (Bowen, L.J.).
>
> Yet the record must contain sufficient evidence to justify a finding of fact that a venireperson was of such a mind set that he or she was, under the law, disqualified, or the finding cannot be said to be supported. In Mr. Murphy's case, there was not sufficient evidence. He was clearly shown to be a person who could not vote in favor of capital punishment without violating his principles. He was not asked (so he never said) whether or not, if the evidence were sufficiently strong and the circumstances sufficiently aggravating, he could nevertheless vote to recommend the death penalty.
>
> Judge Fay recounts for us the painstaking and conscientious efforts of Judge Dewell to adhere to the teachings of Witherspoon in the voir dire proceedings. It seems clear that Mr. Murphy heard and, no doubt, understood what had been asked of those who had been examined before him. One must assume that he fully expected to be asked, after he had acknowledged his principled opposition to the death penalty, whether or not he could nevertheless vote in favor of it if the evidence in the case indicated it to be appropriate under the law. For aught appearing, he may have felt compelled under his oath to say that he could. Until it appeared that he could not, he was not disqualified. Applying the teachings of Davis v.

> Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the writ must issue, conditioned upon resentencing.

725 F.2d at 1541 (footnote omitted).

The Supreme Court made crystal clear in Wainwright v. Witt, 496 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) that it reaffirmed the standard it had set in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) when it said:

> That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

105 S.Ct. at 852 (quoting from Adams) (footnote omitted).

It is clear that juror Murphy was never given an opportunity to state whether his views would prevent or impair the performance of his duties.

I also dissent on the issues of prosecutorial misconduct and ineffective assistance of counsel as I did initially as a member of the three judge panel, 699 F.2d 1031 (11th Cir. 1983) at pages 1040-1043.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 27
SPENCER D. MERCER
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NO. 81-5590

WILLIE JASPER DARDEN,

Petitioner-Appellant,
Cross-Respondent,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State
of Florida,

Respondent-Appellee,
Cross-Petitioner.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING DIRECTED TO THE EN BANC COURT

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

PER CURIAM:

At the request of one of the members of the en banc court, the court has been polled on the petition for rehearing

* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C.A. § 46(c).

addressed to the en banc court. Less than a majority of the en banc court, and less than a majority of the judges in regular active service, have voted in favor of the petition. The petition for rehearing is, therefore, DENIED.

At 9:00 a.m. Tuesday, September 3, 1985, the mandate will issue and the stay of execution heretofore and presently in effect shall terminate.

CLARK, Circuit Judge, dissenting:

I dissent from the denial of petitioner's motion for rehearing en banc in this case. Using either the Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985), or the Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), standard,[1] Darden is entitled to habeas corpus relief due to the prosecutor's closing argument at the guilt/innocence phase of his trial.[2]

No one, not even the State, as the district court noted, has ever asserted the arguments given by the prosecutors in this case were anything but improper. Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981). The magistrate in this case concluded: "I am convinced . . .

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[1]As I noted in my dissent from the denial of rehearing in Brooks, the majority's use of the Strickland v. Washington prejudice standard cannot be reconciled with the Supreme Court's utilization of the "no effect" test in Caldwell. Brooks v. Kemp, No. 83-8028 (July 23, 1985) (Clark, J. dissenting). Rehearing should be granted to clarify the discrepancy between the language of the en banc court in Brooks and that of the Supreme Court in Caldwell. Using either, however, Darden is entitled to relief.

[2]A review of the record clearly indicates that the prosecution made its sentencing argument at the guilt/innocence phase. Early in Mr. McDaniel's argument he stated:

> I will guarantee you I will ask for death [at the penalty phase]. There is no question about it. The second part of the trial I will request that you impose the death penalty. I will ask you to advise the court to give him death. That's the only way I know that he is not going to get out in the public. It's the only way I know. It's the only way I can be sure of it.

that the jury was prejudiced against Darden by the argument." Under the new Brooks test, prejudice is the key element that a petitioner must demonstrate.

The most important factor in this case is the evidence the State presented against Darden. The evidence against Darden was far from overwhelming. Essentially, the State's case hinged on the identification of Darden by two eyewitnesses, the victim's wife and a young boy employed part-time by the victim. There was very little corroborating evidence. Darden at all times denied any involvement in the crime. Furthermore, as I argued in my dissent to the original panel opinion, the eyewitness identifications were conducted, at the very least, in a highly suspect manner. Darden, supra, 699 F.2d at 1040-41 (Clark, J., dissenting). The closing arguments in numerous improper instances emphasized the reliability of eyewitness identification testimony, the lack of credibility of Darden as well as his "animal" nature, and stressed that death was the only sentence that would protect the public.

Using the Brooks test, the strength of the evidence against the accused is a factor in determining whether the argument exceeded constitutional limits.[3] It would seem that the evidence here is weaker than in any of the four cases recently decided by the en banc court. The

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[3] In Brooks, the majority at one point stated: "an outcome based on weak evidence might be more likely to have been affected by errors than one based on a very strong case." 762 F.2d at 1385.

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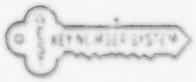
argument is as egregious as any. Thus, it would seem that the "but for" or prejudice test of Brooks has been satisfied in this case. Certainly it cannot be said that the argument had no effect on the sentencing decision. See Caldwell, supra, 105 S.Ct. at 2646. Therefore, I dissent.

vant information or called them as witnesses. Consequently, appellants' *Brady* claim is without merit.[5]

[5] Similarly, appellants' Sixth Amendment Confrontation Clause claim lacks merit. As noted above, the record simply does not support appellants' contention that without the psychiatric reports they were unable to cross-examine Marshall effectively. *Cf. United States v. Abbott*, *supra* (rejecting a similar challenge made by co-defendant Abbott regarding the "limitations" on cross-examination at his trial).

The judgment of the district court is AFFIRMED.



Willie Jasper DARDEN, Petitioner, Cross-Respondent,

v.

Louie L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, Respondent, Cross-Petitioner.

No. 81-5590.

United States Court of Appeals, Eleventh Circuit.

Sept. 1, 1983.

Robert Augustus Harper, Jr., Gainesville, Fla., John Perry, Tallahassee, Fla., for petitioner, cross-respondent.

Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent, cross-petitioner.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

BY THE COURT:

On its own motion, the court en banc orders that the decision entered by it on July 1, 1983, 708 F.2d 646, affirming the decision of the district court by reason of an evenly divided court, is VACATED, and the court en banc will reconsider the case without oral argument during the week of September 12, 1983.

The execution of appellant Willie Jasper Darden is STAYED pending such reconsideration and further order by the court.

PURITAN INSURANCE COMPANY, Plaintiff-Appellee,

v.

BUTLER AVIATION-PALM BEACH, INC., Defendant-Appellant.

No. 82-3417.

United States Court of Appeals, Eleventh Circuit.

Sept. 19, 1983.

Suit arose out of theft of an airplane from premises of a fixed base operator at

strated that disclosure of the reports would have affected the outcome of the case.

5. The trial judge summarized the facts succinctly during a colloquy at trial when he made the following statement to one of appellants' attorneys: "You don't have the reports in your file to cross-examine him on because you haven't done anything for two months." Record on Appeal, vol. 3, at 106.

* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. 46(c).

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IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN
AND FOR CITRUS COUNTY, FLORIDA.

STATE OF FLORIDA :

VS : CASE NO. CT73-2027 C

WILLIE JASPER DARDEN :

FINDINGS OF FACT FOR SENTENCE

The Defendant, WILLIE JASPER DARDEN, was indicted by the Grand Jury of Polk County upon a charge of murder in the first degree. He was also charged in the same indictment with the offenses of robbery and assault with intent to commit murder at the same time and place as the charged murder. To each of the charges of this Indictment, he entered a plea of Not Guilty. After a change of venue was granted, trial was then held in Citrus County and the Defendant was found guilty of all charges by a jury of twelve persons.

The separate sentencing procedure provided by Florida Statute was then held before the trial jury. It returned an advisory sentence to the Court recommending the imposition of the death sentence. It becomes my duty to review the entire trial and sentencing procedure and enter written Findings of Fact and my conclusion from them of the proper and just sentence to be imposed under our capital felony law.

The victims of these offenses were each innocent, law abiding, decent citizens, calmly going about their every day affairs. The Defendant, at gun point, robbed Mrs. Turman at a rural area furniture store, without resistance from her. When her husband suddenly appeared at the back door of the store, the Defendant coldly immediately and without warning, shot and killed him in the door. Mr. Turman posed no threat to the Defendant and did not even have an opportunity to flee. The Defendant then, within a few feet of her dying husband, demanded that Mrs. Turman perform an unnatural sex act upon him. A 16 year old neighbor boy arrived in innocent ignorance to help the Turmans. He was rewarded by being shot three

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times by the Defendant, twice in the mouth and neck while he was stooping to help the dying Mr. Turman, and once in side or back as he fled.

At the time of the offense, the Defendant was on a weekend furlough from the State Prison where he was serving a sentence.

I find this evidence to show the offenses to be shocking, cruel, bestial and without any possible justification, excuse or provocation. They show a cold, heartless and vicious disregard for human life and dignity.

Another Judge of our Court previously had the Defendant examined to determine his mental competence. He was found to be competent. Shortly before the trial, at the request of Defendant's counsel, I ordered the further examination of the Defendant by a different, private clinical psychologist and a psychiatrist to determine if the Defendant, although competent, was subject to some personality disorder or emotional problem which in some way might explain or mitigate the atrocities committed. The Doctors reported they were unable to offer any mitigating opinion or evidence. I recite this not in aggravation, but to show the absence of mitigation in this regard.

The Defense essentially consisted of a denial that the Defendant was the man who committed the crimes. In mitigation, after conviction, the Defendant again emotionally and with what appeared on its face to be sincerity, proclaimed his innocence.

The evidence was sufficient to convince the jury of the guilt of the Defendant beyond a reasonable doubt. I concur in that conclusion.

I find from the evidence and the record the following aggravating circumstances:

(1) The capital felony was committed by the Defendant, WILLIE JASPER DARDEN, while he was under sentence of imprisonment.

(2) The capital felony was committed by him while he was engaged in the commission of a robbery.

(3) The capital felony was especially heinous, atrocious and cruel.

In mitigation I find the following circumstances:

(1) The Defendant is the father of seven children.

(2) The Defendant repeatedly professed his complete innocence of the charges.

I do, therefore, conclude, find and determine that sufficient aggravating circumstances exist as enumerated above to require imposition of the death sentence and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

I find the conclusion inescapable that the law in such cases made and provided, justice, good conscience and the general welfare of the State of Florida require me to impose the death sentence.

JOHN H. DEWELL, Circuit Judge

CERTIFIED TO BE A TRUE COPY
Attest: Walt Connors
CLERK CIRCUIT COURT
By _____ D. C.
this 14 day of June A. D., 19 78

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED

NO. 83-8028

WILLIAM ANTHONY BROOKS,

versus Petitioner-Appellant,

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Georgia

ON PETITIONS FOR REHEARING

(July 23, 1985)

BEFORE GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Footnote 40 of the opinion is hereby deleted. In the last sentence of the second paragraph of footnote 39, the words "a claim" are hereby deleted, and the words "an argument" are substituted in lieu thereof.

IT IS ORDERED that the petitions for rehearing filed in the above-entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT

United States Circuit Judge

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CLARK, Circuit Judge, dissenting, with whom KRAVITCH and JOHNSON, Circuit Judges, join:

I dissent from the decision of the en banc court to deny rehearing in this case. The majority's use of the Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different) is in conflict with the recently decided Supreme Court case of Caldwell v. Mississippi, 53 U.S.L.W. 4743 (June 11, 1985).

In Caldwell, the Supreme Court in evaluating the impact of an improper argument used by the prosecutor at the penalty phase of Caldwell's trial concluded:

> Because we cannot say that this effort [to minimize the jury's responsibility for determining the appropriateness of the death penalty] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

53 U.S.L.W. at 4748 (emphasis added).

The language used by the Supreme Court in Caldwell is, in essence, a paraphrase of the harmless error test used by the Court in numerous cases, most notably in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As I maintained in my special concurrence in this case, the harmless error test is incompatible with the Strickland v. Washington prejudice test, which shifts the

burden of proof to the petitioner to demonstrate that but for the improper argument the result of the proceeding would have been different.

Furthermore, the prosecutor in this case made statements at the penalty phase indicating that he seldom sought the death penalty and then gave the factors he considered in deciding whether to seek the death penalty in a particular case. The majority of the en banc court was troubled by this type of argument, i.e., the prosecutorial expertise argument. The root of the en banc majority's concern was identical to that espoused by the Caldwell majority, i.e, that the prosecutor's statement would lessen the jury's sense of responsibility for determining the appropriateness of the death penalty. Additionally, the majority recognized that the argument in this case had at least some prejudicial effect. The majority stated:

> Although we cannot conclude that these few improper arguments had no prejudicial effect on the jury, we are satisfied the prejudice was not severe.

Brooks v. Kemp, No. 83-8029, slip op. at 4490 (11th Cir. May 31, 1985).

Therefore, the conclusion seems inescapable that our court's en banc opinion in this case conflicts with the Supreme Court's holding in Caldwell v. Mississippi, supra. The majority of our court found that the prosecutor's argument had some effect on the sentencing decision in Brooks' case. The Supreme Court in Caldwell held that the constitutional standard of reliability in the sentencing

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phase required another [illegible] which it was able to find than the prosecutor's argument had no effect upon the jury's decision. Consequently, I think we err when we do not reconsider our opinion in Brooks and I therefore dissent.

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FOR THE ELEVENTH CIRC[illegible]

No. [illegible]

WILLIAM BILLY TURNER,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Middle District of Georgia

- - - - - - - - - - - - -

ON PETITION FOR REHEARING

(JUL 23 1985)

BEFORE GODBOLD, Chief Judge, [illegible], HILL, [illegible], HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby [illegible]

ENTERED FOR THE COURT:

United States Circuit Judge

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REHG-4
(Rev. 6/82)

CLARK, Circuit Judge, dissenting, with [illegible] and JOHNSON, Circuit Judges, join:

I dissent from the decision of this court to deny rehearing in this case. The majority's use of the Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different) is in conflict with the recently decided Supreme Court case of Caldwell v. Mississippi, 53 U.S.L.W. 4743 (June 11, 1985).

In Caldwell, the Supreme Court in evaluating the impact of an improper argument used by the prosecutor at the penalty phase of Caldwell's trial concluded:

> Because we cannot say that this effort [to minimize the jury's responsibility for determining the appropriateness of the death penalty] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment required.

53 U.S.L.W. at 4748 (emphasis added).

The language used by the Supreme Court in Caldwell is, in essence, a paraphrase of the harmless error test used by the Court in numerous cases, most notably in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As I maintained in my dissent in this case, the harmless error test is incompatible with the Strickland v. Washington prejudice test, which shifts the burden of proof

[illegible] the petitioner to [illegible] argument the result of the proceeding would have been different.

Furthermore, the prosecutor in this case made statements at the penalty phase indicating that he seldom sought the death penalty and then gave the factors he considered in deciding whether to seek the death penalty in a particular case. The majority of the en banc court was troubled by this type of argument, i.e., the prosecutorial expertise argument. The root of the en banc majority's concern was identical to that espoused by the Caldwell majority, i.e, that the prosecutor's statement would lessen the jury's sense of responsibility for determining the appropriateness of the death penalty. Additionally, the majority recognized that the argument in this case had at least some prejudicial effect. The majority stated:

> We do not view the relatively small prejudicial impact of the improper arguments as undermining confidence in the sentencing verdict.

William Boyd Tucker v. Kemp, No. 83-8137, slip op. at 4421 (11th Cir. May 31, 1985).

Therefore, the conclusion seems inescapable that the Court's decision in Caldwell v. Mississippi, supra, coupled with the majority's concession of at least some prejudice, requires reconsideration of our opinion in this case. I therefore dissent.

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PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8327

CHARLIE BENSON BOWEN,

Petitioner-Appellee,

versus

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(August 6, 1985)

Before FAY and JOHNSON, Circuit Judges, and YOUNG*, District Judge.

FAY, Circuit Judge:

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*Honorable George C. Young, U. S. District Court Judge for the Middle District of Florida, sitting by designation.

Petitioner, Charlie Benson Bowen, was convicted by a jury in Polk County, Georgia, of rape and murder. He was sentenced to life imprisonment for the rape charge and to death for the murder charge. Having exhausted his state court remedies, Bowen filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, Ralph Kemp, Warden, Georgia Diagnostic and Treatment Center, appeals the district court's grant of the writ.

Respondent raises three issues on appeal: (1) whether the district court erred in holding that the state trial court's charge to the jury during Bowen's culpability trial improperly shifted the burden of proof on the element of intent, in violation of Sandstrom v. Montana, 442 U.S. 510 (1979), and was not harmless beyond a reasonable doubt; (2) whether the district court erred in holding that the prosecutor's closing argument during the sentencing phase of Bowen's trial rendered that phase fundamentally unfair; and (3) whether the district court erred in finding that Bowen was entitled to a new sentencing trial since the sentencing jury was drawn from an unconstitutionally composed traverse jury list. We affirm the district court's jury composition ruling and reverse the district court's rulings on the Sandstrom and prosecutorial argument issues.

I. PROCEDURAL HISTORY

Bowen was indicted in Polk County, Georgia, on charges of

raping and murdering a twelve-year old girl.[1] The trial jury found him guilty on both counts, and, pursuant to Georgia's bifurcated trial procedure, a jury thereafter sentenced him to life imprisonment for rape and to death for murder. On direct appeal, the Georgia Supreme Court affirmed the underlying convictions and rape sentence. The death sentence, however, was set aside and the case was remanded solely for resentencing on the murder conviction. Bowen v. State, 246 S.E.2d 322 (Ga. 1978).

In September of 1978, a Polk County jury again sentenced Bowen to death. The Georgia Supreme Court affirmed, Bowen v. State, 260 S.E.2d 855 (Ga. 1979), and the United States Supreme Court denied certiorari. Bowen v. Georgia, 446 U.S. 970 (1980).

Bowen then filed a petition for a writ of habeas corpus in the Superior Court of Butts County. The writ was denied, as was his application to the Georgia Supreme Court for a certificate of probable cause to appeal that denial. The United States Supreme Court again denied certiorari. Bowen v. Zant, 455 U.S. 983 (1982).

Bowen thereafter sought habeas relief in the United States District Court for the Northern District of Georgia. An evidentiary hearing was held before the United States Magistrate, who recommended that relief be limited to granting Bowen a new sentencing trial on the murder conviction. The district court agreed on this point, but went further; it also held that (1) the jury charge given during the guilt phase of Bowen's trial

impermissibly shifted the burden of proving intent, in violation of Sandstrom, and that this error was not harmless beyond a reasonable doubt, and (2) the prosecutor's closing arguments during the sentencing hearing rendered that phase of Bowen's trial fundamentally unfair.

II(a) THE SANDSTROM ISSUE

Bowen asserts that the following jury instruction impermissibly shifted the burden of proof on the element of intent, in violation of Sandstrom:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor [sic] of facts, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

We agree.

The Supreme Court, in Franklin v. Francis, 53 U.S.L.W. 4495 (U.S. April 29, 1985), held that a portion of a jury charge virtually identical to the one at issue here "undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent." Id. at 4498. The Court also rejected the state's argument, identical to the one advanced by respondent in the instant case, that any technical infirmity in the chal-

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lenged instruction was sufficiently cured by clarifying language found elsewhere in the charge. Id. at 4498-4500. "[B]ecause the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause." Id. at 4500. The district court did not err in finding that the instruction violated Sandstrom.

II(b) HARMLESS ERROR

The Supreme Court has not yet determined "whether an erroneous charge that shifts a burden of persuasion on an essential element of an offense can ever be harmless." Id. We recognize, however, that four members of the Supreme Court have suggested that a jury instruction violating Sandstrom cannot be considered harmless error except in "rare situations." Connecticut v. Johnson, 460 U.S. 73, 87 (1983) (plurality opinion). Since this position has yet to command a majority of the Court, we continue to apply the harmless error analysis in the Sandstrom context, as we do with most other errors of constitutional significance. See Tucker v. Francis, _____ F.2d _____ (11th Cir. 1985) (en banc) (M/S at 7); Davis v. Kemp, 752 F.2d 1515, 1521 (11th Cir. 1985) (en banc).

The Davis Court fleshed out the contours of the harmless error inquiry as it relates to a Sandstrom violation. Davis recognized that this circuit has identified two situations where

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the harmless error rule can be invoked. Harmless error analysis is proper "if the evidence was overwhelming as to the defendant's guilt and if the instruction was applied to an element of the crime which was not at issue at the trial." Id; accord, Tucker, _____ F.2d _____ (M/S at 8); Brooks v. Francis, _____ F.2d _____ (11th Cir. 1985) (en banc) (M/S at 8). Davis further states that with respect to the first situation, the court's analysis should "focus on whether evidence of intent, rather than the more inclusive issue of guilt, is overwhelming." Tucker, _____ F.2d _____ (M/S at 8) (emphasis in original) (citing Davis, 752 F.2d at 1521 & n.10). In this regard, the nature of the defense asserted at trial may be an important factor. See Brooks, _____ F.2d _____ (M/S at 9).

A reading of Davis and its progeny reveals that when a court focuses on the degree of evidence of intent, it should examine the evidence without reference to the particular defendant. In other words, the court should examine the evidence as if the allegedly criminal conduct had been performed by some anonymous actor. For example, in Davis, where the defense essentially was non-involvement, the Court examined the circumstances of the victim's death and concluded "that whoever killed the victim did so with intent and malice." Davis, 752 F.2d at 1521. In Tucker, another non-involvement defense case, the Court reasoned that the evidence was overwhelming that whoever killed the victim did so intentionally because "the victim died of one crushing blow to the skull by a blunt instrument." Tucker, _____

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F.2d _____, (M/S at 9). A similar tack was taken in Brooks, a case in which the defendant asserted accident as his defense. In holding the Sandstrom violation to be not harmless beyond a reasonable doubt, the Brooks Court emphasized that the evidence of intent was not overwhelming because of the manner in which the victim was killed. Brooks, _____ F.2d _____ (M/S at 10-14 & n.14).

Using this approach, we conclude that the evidence of intent to kill Sheila Denise Young, the victim in this case, was overwhelming. The child's nude body was found beside a bloodied mattress in a vacant house. She had been stabbed fourteen times about the face, chest, and abdomen, and died because of loss of blood. Her death obviously was not the result of accident, mistake, or negligence, but rather was the result of an "intentional" act.

Moreover, Bowen, in a very real sense, conceded the issue of intent. In discussing those "rare situations" where the Connecticut v. Johnson plurality might employ the harmless error rule, Justice Blackmun stated:

> [A] Sandstrom error may be harmless if the defendant conceded the issue of intent. See, e.g., Krzeminski v. Perini, 614 F.2d 121, 125 [6th Cir.], cert. denied, 449 U.S.866 (1980). See also Washington v. Harris, 650 F.2d 447, 453-454 [2d Cir. 1981], cert. denied, 455 U.S. 951 (1982). In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

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Connecticut v. Johnson, 460 U.S. at 87 (emphasis added). Bowen's sole defense at trial was insanity; he never denied that he repeatedly stabbed Sheila Denise Young. By relying exclusively on an unsound mind defense, Bowen effectively conceded that if his defense were not accepted, it could not be gainsaid that his acts were anything but intentional.

The instant case is readily distinguishable from Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983), aff'd by an equally divided Court, 104 S. Ct. 1673 (1984) (per curiam), a factually similar case relied upon by the en banc Court in Davis. The defendant in Koehler was convicted of first degree murder. His "sole defense was temporary insanity because of the effects of alcohol, drugs and dissociative reaction." Koehler, 707 F.2d at 243. The Sixth Circuit found that a Sandstrom burden-shifting instruction was not harmless error beyond a reasonable doubt, and therefore granted habeas relief. Id. at 246. The court reasoned that the Sandstrom violation was not harmless because the evidence concerning the defendant's lack of mens rea defense was conflicting. Id.

The similarity between the instant case and Koehler ends, however, with the Sandstrom violations and the defenses asserted. The instruction condemned in Koehler stated that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts." Id. at 243 (emphasis in original). The clear import of this instruction is that the

presumption applies to all persons, whether sane or not. In the instant case, however, the offensive presumption would not become operative unless and until the jury found that Bowen was "a person of sound mind and discretion." In other words, if the jury accepted Bowen's insanity defense, and he thus was considered a person of unsound mind, the jury could not presume that he intended the natural and probable consequences of his acts.[2] But the jury did not accept Bowen's defense. Consequently, the jury conceivably could have relied on the "mandatory rebuttable presumption." By that point, however, Bowen's sole defense already had fallen by the wayside, and intent no longer was a viable issue in the trial.

Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983), aff'd, 53 U.S.L.W. 4495 (U.S. April 29, 1985), is instructive by way of comparison. In Franklin, the court found that an instruction identical in all material respects to the one at issue here violated Sandstrom. The court held that the error was not harmless since the facts did not overwhelmingly preclude the defendant's accident defense. The court reasoned: "A presumption that Franklin intended to kill completely eliminated his defense of 'no intent.'" Franklin, 720 F.2d at 1212 (emphasis added).

The lesson of Franklin is clear: A Sandstrom violation will not be deemed harmless if the presumption works to deprive the defendant of an asserted defense that is plainly at issue. Here, unlike the situation in Franklin, the defendant's sole defense had been "completely eliminated" before the proscribed

presumption could have become operative. Cf. Connecticut v. Johnson, 460 U.S. at 98 n.6 (Powell, J., dissenting) ("The question of intent is one of fact and . . . before a jury even reaches the presumption instruction it must find facts that are a predicate for the presumption.").

Based on the foregoing, we hold that it is beyond a reasonable doubt that the Sandstrom error in this case did not contribute to Bowen's murder conviction. The error was harmless and we therefore reverse the district court's holding to the contrary.

III. PROSECUTORIAL ARGUMENT

Bowen challenges portions of the prosecutor's closing argument during the sentencing phase of his trial. Bowen argued in his petition filed in the district court that the following passage improperly raised the possibility that he might be paroled from a life sentence:

> [The Prosecutor]: And now we come up here with this idea that here is a man that even though he knew that he himself . . . even though he was convicted in his own heart and he desired to die and we are approached with the proposition that he is subject to be rehabilitated and released back into society.
>
> Yeah, I guess he can be rehabilitated. Hitler could have been. I believe in about six or eight months if I'd had him chained to a wall and talked to him and beat him on one side of the head for a while with a stick telling him you believe this don't you then beat him on the other side with a stick telling him you believe that don't you I believe I could have rehabilitated Hitler.

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> Yeah, it's conceivable that he could come back into society. It's conceivable that he can go back to work at Goodyear Mills in the twister room. Yeah, it's conceivable that he can go see Angie some more. Yeah, it's conceivable that he can be let out to gamble, it's conceivable that he can be let out to drink his beer and smoke his marijuana, and it's conceivable that he could pick up another little twelve year old girl, if you want him to all you've got to do is . . .
>
> [Defense Counsel]: I'm going to object to this line or [sic] argument. Your honor, I think this is going beyond the bounds of a fair argument and I suggest that he be directed to cease from that.
>
> The Court: I overrule your objection.
>
> [The Prosecutor]: They say he can come back into society. Some of them would welcome him with open arms but I'm not. They can call me what they wish, unchristian or whatever they want to. I'm not willing to. I'm willing to abide by your determination because it's a determination you must make.

Tr. at 576-77.

The district court, on the basis of this and other statements made by the prosecutor in his closing argument which will be discussed below,[3] held that Bowen's sentencing trial was rendered fundamentally unfair. We disagree.

The law is clear that habeas relief will not be given for improper prosecutorial arguments unless those arguments rendered the sentencing proceeding "fundamentally unfair." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); see Brooks, _____ F.2d _____ (M/S at 26); Tucker, _____ F.2d _____ (M/S at 12); Drake v. Francis, _____ F.2d _____ (11th Cir. 1985) (en banc) (M/S at 16-17). To make that determination, the reviewing court must decide whether there is a reasonable probability that, had the

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remarks not been made, the sentencing outcome would have been different. Brooks, _____ F.2d _____ (M/S at 31) (citing Strickland v. Washington, _____ U.S. _____, 80 L.Ed.2d 674, 698 (1984))

As an initial matter, we interpret the content of the argument quoted above as more a comment on Bowen's future dangerousness and prospects for rehabilitation than an injection of the possibility of parole into the sentencing hearing. Throughout the sentencing hearing, defense counsel attempted to portray Bowen as a person who converted to Christ after his incarceration for killing Sheila Denise Young. For example, J.D. Bryant, a deputy sheriff with the Polk County Sheriff's Department, was called to testify on behalf of Bowen. Bryant worked at the jail where Bowen had been housed since his arrest. Bowen's counsel specifically asked Bryant if he had "any opinion regarding [Bowen's] potential for rehabilitation and return to society." Tr. at 278. Bryant, a Baptist minister, testified that in his opinion, Bowen truly had experienced a religious conversion and now was a "model individual" who "could participate in society and become a useful member of society." Id.

The en banc court has made it clear that consideration of future dangerousness "is a proper element in the sentencing jury's decision." Brooks, _____ F.2d _____ (M/S at 48). "Similarly, . . . the jury may appropriately consider whether [the] defendant is . . . so unlikely to be rehabilitated that incapacitation is warranted." Id. at _____ (M/S at 39). The prosecutor

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therefore did not act improperly when he attempted to nullify Bowen's characterization of himself as a person who was fully rehabilitated as the result of a recent spiritual metamorphosis.

We nonetheless agree with the district court that the challenged argument improperly stated the prosecutor's personal opinion regarding Bowen's potential for rehabilitation. The Supreme Court, in a related context, recently stated:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its view of the evidence.

United States v. Young, 105 S. Ct. 1038, 1048 (1985). Additionally, "[a]n attorney's personal opinions are irrelevant to the sentencing jury's task." Brooks, _____ F.2d _____ (M/S at 41).

It is clear that the Hitler analogy was an improper statement of the prosecutor's personal opinion regarding Bowen's rehabilitative potential. Similarly, the prosecutor's personal feelings concerning Bowen's possible return to society were irrelevant and improperly put before the sentencing jury.

The district court also condemned the following arguments made by the prosecutor: "If you [the jury] want him [to return to society as a rehabilitated man] fine, but I don't want him in my society;" Tr. at 564; "I wish [Bowen] had woke up dead." Id.

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at 575. Although these statements arguably advocate the appropriateness of retribution, a penological justification for the death penalty which is properly considered by the jury, Brooks, _____ F.2d _____ (M/S at 38-39), the fact remains that they were couched in the form of personal opinions. These arguments therefore also were improper.

The district court took issue with the prosecutor's characterization of Bowen as "a product of the devil," Tr. at 565, "a liar," id. at 567, who was "no better than a beast." Id. at 569. We address these in turn.

With respect to the first of these remarks, we note that the prosecutor was not referring specifically to Bowen, but rather was commenting on the insanity defense in general. The prosecutor was simply making the point that not all perpetrators of heinous crimes are insane and that society has "gotten away from the old time idea that [a defendant can commit a vicious crime] because [the defendant is] a product of the devil, and [the defendant commits the crime] because [he does not] care." Id. at 565. Although dramatic, we do not view this argument as improper.

We also do not regard the prosecutor's statement that Bowen was a liar as improper. When the term was used, the prosecutor was arguing to the jury that Bowen did not act like a person who was disoriented and out of touch with reality when he killed Sheila Denise Young. The prosecutor argued that Bowen tried to cover up the fact that he had attacked his own daughter shortly

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before the crimes for which he was convicted. The prosecutor stated: "But he wanted to hide the fact it was him. If he was out of touch with reality what did it matter. He'd say why sure, I did that. No, he lied to his wife about it and he lied to everybody about it. . . ." Id. at 567. The prosecutor's argument has ample support in the record and is not improper.

The reference to Bowen as "no better than a beast" was made as part of an argument that Bowen, who apparently attempted to commit suicide shortly after he attacked his daughter, himself believed that he should forfeit his life for attacking his own flesh and blood. This reference was supported by the evidence and was not improper. See Tucker, _____ F.2d _____ (M/S at 18-19) (description of defendant as "less than human" not improper where supported by the evidence).

The following argument also was censured by the district court: "We are living in the days of Cain and the voices heard are Abel's crying out to us all the time the voices of the murdered cry out. . . . To whom do they call? The can only call to the ministers of the law for recompense or vengence [sic]. . . . As a juror, you are a minister of the law. The only place Sheila Denise Young has to appeal to is you." Tr. at 578-79. This argument was, in our view, not improper.

"It is completely appropriate to remind the jury of the importance of its sentencing decision." Tucker, _____ F.2d _____ (M/S at 20). This is precisely what the prosecutor did here, albeit in rather colorful prose. He did not argue that any

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future victim of Bowen would be on the jury's conscience, nor did he state that the jurors were the only persons who could stop Bowen from killing again. See id. at 21. Rather, the prosecutor was bringing home the point that the jurors were the only "ministers of the law" able to exact appropriate retribution from the slayer of Sheila Denise Young. This was proper argument. Cf. Brooks, _____ F.2d _____ (M/S at 49) ("The reminder to the jury that 'the buck stops with you today' was an appropriate reference to the fact that the jury must make the ultimate decision.").

The final argument the district court relied upon to invalidate the sentencing hearing went as follows: "You know for a criminal to go without proper punishment is a disgrace to the society we live in and it's shown to us every day by the fruits that we reap from day to day in our society when we have the bloody deeds such as this occur." Tr. at 579. Standing alone, this passage does not appear to be an improper argument. When read in context, however, it is clear that the prosecutor was giving his watered-down rendition of an argument found improper by the en banc Court in Drake, _____ F.2d _____.[4]

Immediately before the challenged argument the prosecutor stated:

> You know one of our noted justices once said that the sickly sentimentality that causes us to shirk whenever the axe of justice is about to fall that it is not true sentimentality, that it cannot produce true justice, that it may be the sign of a tender heart but it is also a sign of one not under proper regulation.

> Now, society, this is in the words of a justice, demands that crime be punished for criminal deeds and false humanity starts and shudders when the axe of justice is ready to strike is a dangerous element to peace and society. That's true today. Justice as it has been for years and years.
>
> Now we've had too much of this and it's not true. We must insist on mercy for society and not always look to the criminal convicted of hideous, monstrous, vile, outrageous acts.

Tr. at 579 (emphasis added). Immediately after the challenged argument, the prosecutor stated:

> But do you know what it would take to stop it, a stern, unbending, unflinching administration of the law, stern punishment by people who stand for something, are willing to stand up and fulfill the commands of the law.

Id. at 579-80.

In light of Drake, we conclude that this argument was improper. Although the prosecutor did not specifically invoke the Supreme Court of Georgia to abjure mercy, as was the case in Drake, he did attribute to a "justice" the view that opting for mercy was frowned upon. The argument was not as prejudicial as the one challenged in Drake, see infra note 5, yet nonetheless was improper.

We have identified two types of improper prosecutorial argument at Bowen's sentencing trial: (1) the prosecutor's statements of his personal opinions; and (2) the prosecutor's suggestion that a "noted justice" believed that mercy was an inappropriate consideration for Bowen. Because the improper

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arguments focused in the main on Bowen's rehabilitative prospects and the propriety of mercy, we conclude that they did not influence the jury's finding of aggravating circumstances. Indeed, Bowen does not even contend that the argument found improper by the district court affected the jury's finding that the murder was horrible or inhuman because it involved torture. See Ga. Code Ann. § 17-10-30(b)(7); Tr. at 613. Therefore, under Georgia law, Bowen was eligible for the death penalty.

That, however, does not end the inquiry. As we have seen, see supra p. 11-12, the recent en banc decisions of this Court instruct that to determine whether improper arguments rendered a sentencing trial fundamentally unfair, we should ask whether there is a reasonable probability that, in the absence of those arguments, the death penalty would not have been imposed. See, e.g., Brooks, _____ F.2d _____ (M/S at 31, 52). "This inquiry involves an evaluation of the improper remarks in the context of the entire proceeding. . . ." Id. at 52.

The prosecutor improperly put before the jury his personal opinions. The principal thrust of his argument, however, made it clear that only the jury could decide whether or not Bowen should be executed. The prosecutor began his argument by stating that "it is necessary that you twelve jurors decide what punishment [Bowen] is to receive for the offense of murder." Tr. at 560. Further along in his argument the prosecutor conceded that "I'm willing to abide by your [the jury's] determination because it's a determination you [the jury] must make." Tr. at 577. He also

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said that "[t]he only place that Sheila Denise Young has to appeal to is you [the jury]." Id. at 579. Thereafter, the prosecutor specifically advised the jury that "in order to fulfill the commands of the law in this case you do whatever you wish." Id. at 580. The prosecutor concluded his argument by exhorting the jurors to search their consciences and souls and return a verdict of death, yet recognized that "[t]hat's a decision you [the jury] must make." Id. at 581.

The trial judge's instructions also made it abundantly clear that no one save the jury was responsible for the ultimate decision, life or death for Bowen. In the first paragraph of his charge, the judge instructed the jury that "[y]ou [the jury] have been empowered to fix the punishment for the offense for which [the defendant] has already been convicted." Id. at 605. In the next paragraph, the judge charged that the jurors "are the judges of the law and facts of this case. . . . You are made the exclusive judges as to the credibility of witnesses." Id. The judge also charged the jury that even if the state proved the existence of an aggravating circumstance, the jury "would [still] be authorized to fix the punishment of the defendant at life imprisonment." Id. at 609. The judge further instructed that the verdict forms "are not in any manner to suggest to you what your verdict should or should not be. That is entirely up to you." Id. at 610.

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In these circumstances, we have little difficulty concluding that the jury understood that it bore sole responsibility for the sentencing decision and that the prosecutor's opinions were no more than that. The improper statements of opinion were fairly isolated within the body of the prosecutor's argument, and represented only a small part thereof. Any prejudice from the improper remarks was for the most part alleviated by other statements of the prosecutor and the judge's charge. We find no reasonable probability that, absent the improper statements of opinion, Bowen would not have been sentenced to death.

Similarly, we hold that there is no reasonable probability that the prosecutor's invocation of the views of a "noted justice" changed the outcome of the sentencing hearing. First, as previously noted, the thrust of the prosecutor's own argument made it unmistakeably clear that the jury could do as it pleased. Bowen's counsel also emphasized the fact that, under Georgia law, the jury could opt for life rather than death, even if it found the existence of an aggravating circumstance, after considering all the circumstances. See id. 600-01 ("[E]ven if you find that this was a vile heinous act you still have the option because of considering the man of awarding that man a life sentence instead of a death sentence"); id. at 602 ("[I]f you consider the true Charlie Bowen . . . as the evidence really pictures him, . . . then . . . you have the opportunity to award him a punishment of life in prison rather than being put to death, even for the offense of murder"); id at 604 ("[T]he law

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doesn't say you've got to put a man to death because he murdered somebody and I don't think Charlie Bowen deserves death and...there's evidence here to show you that he doesn't deserve death"). Most importantly, the trial judge, when instructing the jury on mitigating circumstances, advised the jury that mitigating circumstances do not justify or excuse the offense, "but . . .in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability." Id. at 607. The judge also charged the jury that despite the presence of aggravating circumstances, it could fix the punishment of Bowen at life imprisonment "for any reason that is satisfactory to you [the jury]." Id. at 609. The court further instructed the jury that their decision should be informed by "consideration [of] all the evidence, all the surrounding facts and circumstances, and the law as given you . . . by the court." Id. at 610. Finally, as we stated in our discussion of the improper statements of personal opinion, the trial court made it very clear to the jurors that it was entirely up to them whether or not Bowen should be given a death sentence.[5]

The improper argument suggesting the judicial disapproval of mercy does not undermine our confidence in the outcome of the sentencing hearing. We accordingly reverse the district court's ruling that Bowen's sentencing hearing was rendered fundamentally unfair by improper prosecutorial argument.

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IV. COMPOSITION OF THE TRAVERSE JURY LIST

The district court concluded that Bowen was sentenced to die by a jury drawn from a list which unconstitutionally excluded women.[6] We agree.

Decisions by the Supreme Court and this court make it clear that a defendant may challenge the discriminatory selection of state court juries under the equal protection clause of the fourteenth amendment, see Rose v. Mitchell, 443 U.S. 545 (1979); Castaneda v. Partida, 430 U.S. 482 (1977); United States v. Sneed, 729 F.2d 1333 (11th Cir. 1984); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983), and the sixth amendment, which vouchsafes the right to be tried by a jury chosen from a group reflecting a fair cross-section of the community. See Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); United States v. Tuttle, 729 F.2d 1325 (11th Cir. 1984), cert. denied, 105 S. Ct. 968 (1985); Gibson, 705 F.2d 1543. We have noted that the equal protection analysis employs a prima facie case test virtually identical to the one used in the fair cross-section analysis. See Tuttle, 729 F.2d at 1327 n.2; Gibson, 705 F.2d at 1546; United States v. Perez-Hernandez, 672 F.2d 1380, 1384 n.5 (11th Cir. 1982).[7]

The Supreme Court delineated the contours of the equal protection challenge in Castaneda, where it stated:

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> The first step is to establish that the group is one that is a recognizable, distinct class. . . . Next the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as . . . jurors, over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

Castaneda, 430 U.S. at 494 (citations omitted); Mitchell, 443 U.S. at 565. More recently, the Supreme Court set forth the elements of a fair cross-section prima facie case. To prevail on a sixth amendment jury composition challenge:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364. After carefully reviewing the record, we hold that the district court correctly concluded that Bowen established a fourteenth amendment prima facie case.[8]

Respondent concedes that since women constitute a recognizable, distinct class, see Duren, 439 U.S. at 364 (citing Taylor, 419 U.S. at 531); Sneed, 729 F.2d at 1335, the first prong of the Castaneda test has been satisfied. The gravamen of his quarrel with the district court, however, focuses on the weight the court

accepted the statistical disparity between the percentage of women residing in Polk County and the percentage of women on the traverse jury list.

Bowen was sentenced to die in 1978 by a jury drawn from the traverse jury list composed in the fall of 1977. The statistics admitted into evidence in the district court reflect a disparity of -22.7% between the percentage of women residing in the county and the percentage of women on the 1977 traverse jury list. The record further shows that this disparity was not an aberration; rather, the underrepresentation of women was even more dramatic in the four preceding traverse jury lists.[9]

In the face of this evidence of a clear historical pattern of female underrepresentation on Polk County's traverse jury lists, respondent insists that the statistical disparities are not constitutionally significant. We do not agree.

We acknowledge that the Supreme Court has eschewed pronouncing precise mathematical standards for proving systematic exclusion of distinct classes, see Alexander v. Louisiana, 405 U.S. 625, 630 (1972), and that we have followed its lead. See, e.g., Gibson, 705 F.2d at 1547; Bryant v. Wainwright, 686 F.2d 1373, 1376 (11th Cir. 1982), cert. denied, 461 U.S. 932 (1983). We do not, however, write on a clean slate. In factually similar cases, the Supreme Court, this court, and the former Fifth Circuit[10] all have found statistical variances near the 22.7% disparity present in this case to be constitutionally significant. E.g., Turner v. Fouche, 396 U.S. 346 (1970) (23%);

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Hernandez v. Texas, 347 U.S. 475 (1954) (14%); Gibson, 705 F.2d 1543 (20% and 38%); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982) (36% and 42%), cert. denied, 459 U.S. 1127 (1983); Porter v. Freeman, 577 F.2d 329 (5th Cir. 1978) (20.4%). We therefore have no difficulty concluding that the 22.7% variance between the percentage of women residing in Polk County and the percentage of women on the 1977 traverse jury list, immediately preceded by nearly a decade of even greater underrepresentation, is sufficient to satisfy the second prong of the Castaneda test.

The district court also found that the process employed by the Polk County jury commissioners in composing the traverse jury list was susceptible of abuse as a tool of discrimination. We agree.

The Georgia law in effect when the 1977 traverse jury list was composed provided:

> At least biennially, or, if the senior judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officials. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of any significantly identifiable group in the county which may not be fairly represented thereon.
>
> After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list

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> a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

Ga. Code Ann. § 59-106 (current version at Ga. Code Ann. § 15-12-40 (1982)). Although the Supreme Court has characterized this method of selection as "not inherently unfair," Turner, 396 U.S. at 355, it also has recognized that the statute contained the potential for abuse. Id. at 356 & n.14. It is necessary, therefore, to examine the testimony of the Polk County jury commissioners to determine whether the process they used to compose the traverse jury list was susceptible of abuse or not facially neutral.

Members of the jury commission testified both in the state trial court and in the district court. The following passage from the Georgia Supreme Court's summary of the state court jury composition hearing underscores the largely subjective approach taken by the jury commissioners:

> At the hearing on the jury challenge, several members of the Polk County Jury Commission were called to testify. Of the jury commissioners, four are white males, one is a white female, and one is a black male. The jury commissioners testified to the following effect: the appellant's jury was struck from a traverse jury panel which had been most recently revised in September-October, 1977. The panel was drawn from a 1975 Polk County voters registration list, a list of county voters who had voted in the last

general election, a list of persons under court jurisdiction, telephone books, and city directories. The primary source from which the jurors were drawn was the list of voters who had voted in the last election. The commission was given brief instructions from the Polk County Superior Court Judge, including an instruction to have males, females, blacks and whites on the jury list. The commission met as a group and discussed each name considered. They were considered on the basis of each jury commission member's acquaintance with them - specifically on the basis of character, ability, and capability to be a juror. If everybody approved, the name would be placed on the jury list. The commission did not put anyone on the jury list about whom someone on the commission did not know something. They did not take any investigative action to get to know people they did not know. (The jury commissioners were not aware of their duty, imposed by Code § 59-106 (1976 amendment), to supplement the jury list by going out into the county and personally acquainting themselves with other citizens of the county, if it appeared that the jury list, as composed, was not a fairly representative cross-section of the intelligent and upright citizens of the county.) Blacks were designated with "(c)" on the voters lists furnished to the panel, but all of them, particularly the black jury commissioner, knew pretty well the great majority of the black community. They did not know the percentages of male-female or black-white in Polk County, but no one was excluded from the traverse jury panel because of race, age or sex; and it was the aim of the jury commission to secure a cross-section of people from the community for the traverse jury panel.

Bowen v. State, 260 S.E.2d at 857-58 (emphasis added). At the federal habeas hearing, the jury commissioners who testified reiterated that no one was placed on the traverse jury list who was not personally known by one of the commissioners. The district court concluded that this method of selection was susceptible of abuse. Record, Vol. 1 at 215.

Respondent argues that in addressing the third prong of the Castaneda test, the district court improperly focused on only the subjective attributes of the selection process. Respondent urges that the court should have incorporated into its analysis (1) the fact that a woman and a black man were members of the 1977 jury commission; (2) the fact that the jury commissioners did not rely exclusively on the voters registration list to compose the traverse jury list; and (3) the commissioners' assertions that no one was excluded from the list solely on the basis of race or gender. Respondent also argues that the commissioners' collective familiarity with nearly everyone in the county could have prevented abuse of the method of selection. These arguments, however, miss the mark and evince a fundamental misunderstanding of both the third prong of the Castaneda test and the distinction between a prima facie case and a rebuttal case.

To fulfill the third requirement of Castaneda, Bowen was obliged to show that the traverse jury selection process used in 1977 contained the potential for abuse. Bowen clearly made such a showing: (1) the jury commissioners knew the gender of every potential juror; (2) the commissioners were, as a group, personally familiar with practically everyone in the county; and (3) the commissioners discussed amongst themselves the qualifications of each person considered. That a member of the jury commission was black or female, or that several sources were used to gather names, neither magically removes from this process its highly subjective component nor diminishes the ease with

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[illegible] the process could have been manipulated. The same is true of the jury commissioners' assertions that they did not discriminate. This testimony, properly viewed, is at best an attempt to overcome the prima facie case of discrimination. Since the district court correctly concluded that Bowen established a Castaneda prima facie case, the only remaining question is whether or not the court erred in holding that respondent failed to rebut it.

To successfully rebut the prima facie showing of unconstitutional action, the state must present sufficient evidence to "dispel the inference of intentional discrimination." Castaneda, 430 U.S. at 497-98. Although there is no litmus test by which to judge a rebuttal case, it is clear that evidence in rebuttal must focus on "showing that permissible [gender] neutral selection criteria and procedures" have produced the underrepresentation of women on the traverse jury list. Alexander, 405 U.S. at 632; Guice v. Fortenberry, 722 F.2d 276, 280 (5th Cir. 1984); Perez-Hernandez, 672 F.2d at 1387. While the testimony of alleged discriminators should not be summarily dismissed, see Castaneda, 430 U.S. at 498, it should be examined with a healthy amount of judicial scrutiny. Perez-Hernandez, 672 F.2d at 1387. Specifically, "affirmations of good faith in making . . . selections are insufficient to dispel a prima facie case of systematic exclusion." Alexander, 405 U.S. at 632; Castaneda, 430 U.S. at 498 n.19; Guice, 722 F.2d at 280; Gibson, 705 F.2d at 1549. The district court applied these principles to the evidence before

it, and properly found that respondent failed to carry his burden.

Respondent argues here, as he did unsuccessfully in the district court, that this case is distinguishable in crucial respects from Alexander, Castaneda, and their progeny. In support of his position, respondent again directs our attention to the fact that the jury commissioners were neither all white nor all male, to the commissioners' use of multiple sources to gather names of potential jurors, and to the commissioners' denials of discrimination and their asserted awareness of the duty to include on the traverse jury list a fair cross-section of the community. Respondent submits that if the aggregation of these facts does not constitute a successful rebuttal case, none really exists. We are compelled to disagree.

Initially, the fact that a black man and white woman were members of the 1977 jury commission may be irrelevant. The Supreme Court has made it clear that in examining a state's rebuttal case, a court may not presume that persons of a particular class would not discriminate against others of the same class. Castaneda, 430 U.S. at 500. Moreover, regardless of the number and nature of the sources utilized by the jury commissioners to compile names of potential jurors, the fundamental fact remains that "the opportunity to discriminate was presented at later stages in the [jury selection] process." Alexander, 405 U.S. at 632. When respondent's rebuttal case is thus reduced, we are left with the jury commissioners' denials of discrimination.

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True, the testimony of alleged discriminators is not per se insufficient to rebut an equal protection prima facie case. See Perez-Hernandez, 672 F.2d at 1387. It is, however, subject to being weighed by the trial court in considering all the evidence presented. There is a notable absence in this record of any adequate explanation for the clear pattern of female underrepresentation on the traverse jury lists in Polk County. The record provides ample support for the finding of the district court that respondent failed to overcome Bowen's prima facie case of purposeful discrimination. In the words of the Supreme Court, "the opportunity for discrimination was present and [it cannot be said] on this record that it was not resorted to by the commissioners." Alexander, 405 U.S. at 632 (quoting Whitus v. Georgia, 385 U.S. 545, 552 (1967)).

V. CONCLUSION

For the reasons stated in Section II(b), the judgment of the district court in granting habeas corpus relief on the Sandstrom claim is REVERSED.

For the reasons stated in Section III, the judgment of the district court in granting habeas corpus relief on the prosecutorial argument claim is REVERSED.

For the reasons stated in Section IV, the judgment of the district court in granting Bowen a new sentencing trial is AFFIRMED and the case REMANDED for the granting of appropriate relief. Bowen is entitled to a new sentencing proceeding before a properly empaneled jury.

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FOOTNOTES

1. For a detailed discussion of the historical facts in this case, see Bowen v. State, 246 S.E.2d 322 (Ga. 1978).

2. Apart from the language of the challenged instruction, other instructions in the trial court's charge make it clear that acceptance of Bowen's insanity defense would preclude resort to the offensive presumption. After instructing the jury on Bowen's insanity defense (Bowen does not challenge these instructions and we therefore assume they were proper), the court stated:

> [I]f you find that the defendant did not have reason sufficient to distinguish between right and wrong, as I have instructed you, at the time of the commission of the alleged offense . . ., that would be an end to your consideration of the case and you would stop at that point and enter a verdict that would reflect that finding.

Tr. at 463 (emphasis added).

In the next paragraph of its charge, the court instructed the jury:

> If, however, from a consideration of the evidence you determine that at that time and place of the occasion under investigation in this trial that the defendant was sane and thus responsible in such event you would proceed to consider the other portions of the charge that I have given you, or am about to give you.

Id. (emphasis added).

3. In his habeas petition, Bowen specifically contested only the prosecutorial argument quoted supra in the text. This also was the only argument objected to by trial counsel in the sentencing hearing. The district court, however, examined the challenged argument in light of the prosecutor's entire closing. In the court's view, the challenged argument, when considered with other arguments the court found objectionable, rendered the sentencing hearing fundamentally unfair. Because the district court considered arguments which were not objected to at trial, and respondent does not contend here that that consideration was improper, we find it appropriate to address all the arguments the district court regarded as improper.

4. The Drake court found the following argument "extremely improper." Drake, _____ F.2d _____ (M/S at 18):

> If your Honor please, in connection, in my urging you to submit this to the jury, the State of Georgia, the Supreme Court of Geo.gia in Hawkins v. State, in 25 Ga., page 207, the Court, in upholding the murder and the death sentence in that case said this: "Human life is sacrificed at this day throughout the land with more indifference than the life of a dog, especially if it be a good dog." They went on to hold that Cain was the first murderer, but who was the last is known only to those who have read this morning's papers. And they said, "If this crime goes unpunished, let our skirts at least be free from the stain of blood guiltiness."
>
> If your Honor please, in Eberhart v. State, 47 Ga., page 610, the Justice of the Supreme Court of Georgia said this, in connection with the death sentence for murder: "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished, and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society." The Court went on to say, "We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist on mercy to society." And if your Honor please, the Court went on to hold, and in that case, that for criminals to go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which the bloody deed occurs. They said that a "stern, unbending, unflinching administration of the penal laws, without regard to position or sex, that it is the highest mark of civilization, and it is also the surest mode to prevent the commission of offenses.

Id.

5. This case is easily distinguished from Drake, where the improper argument was found to have rendered the sentencing hearing fundamentally unfair. As an initial matter, a comparison of the argument in Drake and the argument made in the instant case, reveals that the latter argument is a more limited, if not rather garbled, version of the former. The prosecutor in Drake specifically invoked the office of the Supreme Court of Georgia in support of his argument. See supra note 4; Drake, _____ F.2d

_____ (M/S at 18). Here, the prosecutor referred only to a "noted justice." The prosecutor in Drake specifically stated that the Supreme Court of Georgia regarded the kind of mercy adverted to as not true mercy. See supra note 4; Drake, _____ F.2d _____ (M/S at 18). Here, no mention was made of mercy, except that society occasionally should be the object of mercy, as well as a criminal defendant. The prosecutor in this case may have tried to quote the Georgia Supreme Court, but he obviously was not successful. Finally, the prosecutor in Drake took pains to note that the quoted passages were taken from Georgia Supreme Court cases involving murder and the death penalty. The prosecutor in this case merely referred to the view of a "noted justice;" no mention was made of the context within which these views were expressed. From the foregoing, we consider the argument in Drake to be a much more severe statement concerning the appropriateness of mercy for a capital crime defendant, and therefore much more prejudicial than the inarticulate argument involved in this case.

6. Given its disposition of the gender discrimination claim, the district court found it unnecessary to address Bowen's companion claim that blacks also were unconstitutionally underrepresented on the traverse jury list.

7. The sixth and fourteenth amendment analyses do differ in one significant respect. To prevail on an equal protection challenge, the defendant must show purposeful discrimination. Duren, 439 U.S. at 368 n.26. Hence, if the defendant makes out a prima facie case, the burden of proof then shifts to the state to show the absence of discriminatory intent. Id.; Castaneda, 430 U.S. at 495; Gibson, 705 F.2d at 1546 n.4. Since, however, discriminatory intent is irrelevant to a fair cross-section challenge, Duren, 439 U.S. at 368 n.26, the state may rebut a sixth amendment prima facie case only be demonstrating "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." Id. at 367-68 (footnote omitted); see Willis v. Zant, 720 F.2d 1212, 1217 (11th Cir. 1983), cert. denied, 104 S. Ct. 3546 (1984); Gibson, 705 F.2d at 1546 n.4; Perez-Hernandez, 672 F.2d at 1384 n.5.

8. In his habeas petition, Bowen contended that the jury panel which sentenced him to death was drawn from a traverse jury list "composed in violation of the Constitution of the United States." Record, Vol. 1 at 18. Since Bowen failed to specify the constitutional basis for his complaint, the district court stated that it would evaluate the jury composition claim under both the sixth and fourteenth amendments. Id. at 210. The court accordingly set forth in its opinion the Castaneda and Duren tests. Id. at 210-11. Absent from the court's opinion, however, is any discussion of the burden the state must carry to rebut a

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sixth amendment prima facie case or any findings on whether respondent had done so in this case. Because we are wary of reaching an issue not ruled upon by the district court, we base our decision regarding the jury composition issue solely on fourteenth amendment grounds. We note, however, that curiously wanting from the record is any evidence offered by respondent concerning a significant state interest justifying the under-representation of women on the Polk County traverse jury lists. See supra note 7 This is puzzling since the record established prior to the district court's ruling is replete with references to sixth amendment fair cross-section cases. See, e.g., Bowen v. State, 260 S.E.2d at 858 (citation to Duren); Respondent's Brief in Support of Answer and Return, Record, Vol. 1 at 26-29 (same); Magistrate's Report and Recommendation, id. at 136-41 (Duren prima facie case applied to facts of this case). In fact, Bowen, in response to a request by the magistrate, filed a pre-hearing brief in support of his contention that he need not show purposeful discrimination to establish a prima facie case. Brief of Petitioner, id. at 83.

9. The disparities are arrived at by comparing 1970 Census Bureau statistics for Polk County to the Polk County traverse jury lists, which are revised every two years. Respondent does not challenge this methodology. The district court based its ruling on the following breakdown by gender of the traverse jury pools and the county census figures:

1977 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1427	69.7%	47.5%	[+]22.2%
Females	612	29.8	52.5	[-]22.7
Sex Unknown	8	.5	-	-

1975 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1290	70.6%	47.5%	[+]23.1%
Females	533	28.2	52.5	[-]24.3
Sex Unknown	4	2.2	-	-

1973 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1352	86.2%	47.5%	[+]38.7%
Females	217	13.8	52.5	[-]38.7

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1971 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1201	76.7%	47.5%	[+]29.2%
Females	365	23.3	52.5	[-]29.2

1969 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1103	76.5%	47.5%	[+]29.0%
Females	338	23.5	52.5	[-]29.0

Record, Vol. 1 at 212.

10. The Eleventh Circuit, in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit handed down prior to October 1, 1981. We also are bound by decisions of Unit B of the former Fifth Circuit rendered after that date. Stein v. Reynolds Secs., Inc., 667 F.2d 33, 34 (11th Cir. 1982).

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JOHNSON, Circuit Judge, specially concurring in part and dissenting in part:

I concur in Section IV of the majority opinion, affirming the judgment of the district court in granting petitioner a new sentencing trial because he was sentenced by an unconstitutionally selected jury. I also concur in Section II(a) of the majority opinion, which holds that a Sandstrom violation occurred. However, I dissent from Section II(b) of the opinion, which holds the Sandstrom violation to be harmless error, and Section III, which holds that the petitioner was not prejudiced by improper prosecutorial argument at the sentencing trial.

I. THE SANDSTROM ISSUE

I acknowledge that I am bound by the recent decisions of the en banc court in Davis v. Kemp, 752 F.2d 1515 (11th Cir. 1985) (en banc), and Tucker v. Kemp, No. 83-8466, slip op. 4531 (11th Cir. 1985) (en banc). However, the majority's opinion unjustifiably extends the harmless error concept to a case where the intent of the admitted killer was clearly at issue.

In Davis, the Court identified two circumstances under which the harmless error rule might be applicable to Sandstrom violations: (1) where the evidence of the defendant's guilt was overwhelming, and (2) where the invalid instruction concerned an element of the crime which was not at issue at trial. Id. at 1521; Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982), cert.

denied, 460 U.S. 1024 (1983). In Davis, the faulty instruction concerned the intent of the defendant, but the Court held that the defendant did not contest the issue of intent. See Davis, supra, 752 F.2d at 1521. The Court held that under those circumstances the faulty instruction, which impermissibly shifted the burden of proof on the intent issue to the defendant, was harmless error. In reaching its conclusion, the Court relied heavily on Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983), aff'd by an equally divided court, 104 S.Ct. 1673 (1984) (per curiam), in which the Sixth Circuit held that a Sandstrom violation could be harmless error where the defendant admits that an intentional, malicious killing occurred but claims non-participation in the crime; but that such a violation could not be harmless error where the defendant asserts lack of mens rea. See Davis, supra, 759 F.2d at 1521; Engle, supra, 707 F.2d at 246.

Although intent was not contested in Davis, intent was very much at issue in the instant case. The petitioner raised a temporary insanity defense, which called into question his capacity to form the requisite intent for malice murder. This is the same defense that was raised in Engle, in which the Sixth Circuit held that a Sandstrom violation was not harmless error. 707 F.2d at 246. Nevertheless, the majority holds that the Sandstrom violation, which may have given some jurors the impression that the petitioner had the burden of proving that he lacked the requisite intent for malice murder, was harmless error.

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The majority points out that the faulty jury instruction in this case stated that one is presumed to intend the natural and probable consequences of his acts if he is a person of "sound mind". The majority argues that this presumption could have become operative only if the jury first determined that the petitioner was sane, i.e., if the jury had already rejected the petitioner's insanity defense. The majority concludes that if the presumption had become operative, and the Sandstrom violation thus occurred, the violation was rendered harmless by the fact that petitioner's defense on the issue of intent had already been rejected by the jury.

The majority's analysis fails to address the fact that the State was required to prove not that petitioner had a sound mind but, rather, that he had the requisite intent for malice murder. Even if the jury rejected petitioner's argument of temporary insanity, the issue of intent was not a defense that petitioner had to prove; intent was an element of the crime that the State had the burden of proving beyond a reasonable doubt. Davis, supra, 752 F.2d at 1528 (Johnson, J., dissenting). By arguing that he had a diminished capacity to form the requisite intent for malice murder, defendant did not thereby admit that he had the requisite intent if he had the capacity to form it. Since intent was a contested issue, holding a Sandstrom error harmless in the present case is an unwarranted extension of the "harmless error" rule.

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II. THE PROSECUTORIAL MISCONDUCT ISSUE

In the present case, the prosecutor argued that a "noted justice" had stated that mercy would be an inappropriate consideration for the defendant. The prosecutor implored the jury to "fulfill the commands of the law," and thus inflict the death penalty on the defendant. The majority holds that, despite this concededly improper argument, the prosecutor did not render the sentencing phase of the trial fundamentally unfair, and appellant is not entitled to habeas relief on this ground. The majority relies on the "prejudice" test adopted by this Circuit in the en banc decision Brooks v. Kemp, No. 83-8028, slip op. 4453, 4488 (11th Cir. 1985) (en banc), which held that a court should grant habeas relief for improper prosecutorial argument at the sentencing phase only if there is a reasonable probability that, in the absence of such argument, the death penalty would not have been imposed.

In holding that the improper prosecutorial argument was not grounds for relief, the majority disregards the recent Supreme Court decision in Caldwell v. Mississippi, 52 U.S.L.W. 4743 (U.S. June 11, 1985), in which the Court vacated a death sentence because the prosecutor used the same kind of improper argument that was used in the present case. Because the recent Supreme Court decision rejects the "prejudice" test adopted in Brooks, I dissent from Section III of the majority opinion.

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A. Caldwell Rejects the Brooks Prejudice Test

In vacating the defendant's death sentence because of improper prosecutorial argument, the Caldwell Court applied a prejudice standard that differs significantly from the 11th Circuit standard formulated in Brooks and relied upon by the majority. In Brooks, the en banc court held that to determine whether to grant habeas relief for improper prosecutorial arguments the reviewing court must decide whether there is a reasonable probability that, had the remarks not been made, the sentencing outcome would have been different. Brooks, supra, slip op. at 4475. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Drake v. Kemp, No. 83-8047, slip op. 4577, 4587 (11th Cir. 1985) (en banc); Strickland v. Washington, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

The basis for the standard adopted in Brooks was the notion that habeas relief should be available only when an error has affected the "fundamental fairness" of the challenged proceeding. This "fundamental fairness" standard originated in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). In that case, the Supreme Court set forth the standard for reviewing habeas corpus petitions raising the impropriety of a state prosecutor's argument in the guilt phase of a noncapital offense. In holding that the relevant inquiry was whether the remark violated due process, the majority stated that "not every trial error or

infirmity ... constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Brooks, supra, slip op. at 4472, citing Donnelly, 416 U.S. at 642.

In order to elaborate on the fundamental fairness standard, the Brooks Court adopted the prejudice standard used by the Supreme Court in Strickland v. Washington, supra. The Brooks Court held that the Court in Strickland, "while addressing a specific Sixth Amendment violation, recognized that 'fundamental fairness' is the central concern of the writ of habeas corpus." Brooks, supra, slip op. at 4473, citing Strickland, 80 L.Ed.2d at 700. The Brooks Court continued, "Thus, the [Strickland] Court acknowledged that fundamental fairness, the same standard adopted in Donnelly, is the governing principle in reviewing errors of counsel. The [Strickland Court's] use of the 'reasonable probability' test to elaborate the underlying principle suggests its applicability to other areas in which fundamental fairness is the guide." Brooks, supra, slip op. at 4474. In short, Brooks held that the standard used to test fundamental fairness in the context of ineffective assistance of counsel claims is equally applicable in the context of prosecutorial misconduct claims in capital cases.

In support of its adoption of the "reasonable probability" test, the Brooks Court argued that that test was "consistent with the standards discussed in Donnelly and with subsequent cases applying the fundamental fairness standard." Id. The Court claimed that those cases indicated that, in determining whether improper argument had a prejudicial impact on the sentencing

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proceeding, it was necessary to look beyond the types of argument used and to look at the strength of the evidence as well. The Court concluded, "Even argument greatly exceeding the bounds of propriety will not be fundamentally unfair in the guilt phase of a case with overwhelming evidence because of the low probability of the argument's impact." Id. at 4474-75 (footnote omitted).

The majority in the present case relies on the standard adopted in Brooks in determining that the improper prosecutorial argument was not a ground for vacating the death sentence. The majority holds that there was no reasonable probability that, absent the improper statements of the prosecutor, Bowen would not have been sentenced to death. Supra at 20.

In concluding that the prosecutor's remarks required reversal of the death sentence, the Caldwell Court did not refer to a "reasonable probability" standard. The Court consistently emphasized that the Eighth Amendment requires a heightened standard of reliability in the capital sentencing decision. See Caldwell, supra, 53 U.S.L.W. at 4745, 4748. The Court concluded, "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 4748.

The "reasonable probability" test adopted by the en banc court in Brooks is incompatible with Caldwell for three reasons. First, the "reasonable probability" test is inconsistent with the Caldwell Court's language in the final section of the majority opinion. The Court held that, for the sentencing phase to satisfy the Eighth Amendment's heightened standard of

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reliability, the reviewing court must be able to say that the improper argument "had no effect on the sentencing decision." Id. This is a far more difficult standard for the State to satisfy than the Brooks standard. Unlike the Brooks standard, which places the burden on the defendant to show prejudice, the Caldwell standard places the burden of proving the absence of prejudice on the State. Prejudice will be presumed unless the reviewing court can say that the improper argument had no effect on the jury's decision. See id. In addition, the State cannot overcome this presumption merely by showing that there is a "reasonable probability" that the improper argument did not affect the outcome. The State must prove that the improper argument "had no effect."

The second reason the Brooks standard is incompatible with Caldwell is that Brooks treated the "reasonable probability" test as a monolithic standard to be applied in every habeas corpus proceeding, regardless of whether the error complained of occurred under the Fifth, Sixth, or Eighth Amendment. See Brooks, supra, slip op. at 4471-74. In specifically alluding to the heightened need for reliability in the capital sentencing phase required by the Eighth Amendment, the Caldwell Court suggested that different prejudice tests are required for the various types of constitutional challenges to the fundamental fairness of a state trial. Caldwell, supra, 53 U.S.L.W. at 4748.

The third reason the Brooks standard should no longer be followed is that, although that standard requires a reviewing court to take into account the strength of the evidence against

the defendant, Brooks, supra, slip. op. at 4474-75, the Caldwell Court looked solely at the type of argument used, in the context of the entire argument and instructions, in determining whether the sentencing phase might have been rendered unfair. The Caldwell Court did not take the strength of the evidence into account at all in determining whether the improper argument affected the fairness of the sentencing phase. See Caldwell, supra, 53 U.S.L.W. at 4747-48. On the contrary, the Court suggested that a reviewing court could not accurately determine whether a jury might have returned a different sentence in the absence of improper argument. The Court said, "It is beyond question that an appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the 'literally countless factors that [a capital sentencer] consider[s]' ... in making what is largely a moral judgment of the defendant's desert." Id. at 4748 n.7 (citation omitted). In short, the Caldwell Court applied a prejudice standard more closely resembling the harmless error test of Chapman v. California, 386 U.S. 18 (1967), than the prejudice test of Strickland.

In addition to indicating that the Brooks prejudice standard was wrongly adopted, Caldwell indicates specific flaws in the way the Brooks standard has been applied. The dissent in Caldwell argued that the impact of the prosecutor's argument regarding appellate review was mitigated by later prosecutorial comments that the jury played an important role in the sentencing process. Caldwell, supra, 53 U.S.L.W. at 4751 (Rehnquist, J.,

dissenting). However, the majority explicitly rejected this argument of the dissent, on the grounds that, "even if the prosecutor's later comments did leave the jury with [the] view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous [improper comment]." Caldwell, supra, 53 U.S.L.W. at 4748 n.7. The Court also emphasized the fact that the trial judge failed to issue strong curative instructions directed specifically at the improper argument. Id. at 4748.

The majority in the present case places heavy emphasis on the fact that "[a]ny prejudice from the improper remarks was for the most part alleviated by other statements of the prosecutor and the judge's charge." Supra at 20. The majority ignores the significance of the fact that neither the trial judge nor the prosecutor made any attempt to cure or retract the specific remarks that the majority concedes were improper. Yet, Caldwell clearly holds that general remarks to the effect that the jury bears responsibility for the sentencing decision are not sufficient to cure the prejudice caused by improper prosecutorial arguments aimed at diminishing the jury's sense of responsibility. Caldwell, supra, 53 U.S.L.W. at 4748 n.7.

B. Caldwell Controls the Outcome in the Present Case

In Caldwell, the prosecutor argued that the jury would not bear responsibility for the imposition of a death sentence, because a death sentence would automatically be reviewed by an appellate court. The Court said that a capital sentencing jury, made up of individuals placed in a very unfamiliar situation and

called on to make a very difficult and uncomfortable choice, might welcome the opportunity to diminish the importance of its role and delegate its decision making authority to others. The Court said,

> This problem is especially serious when the jury is told that the alternative decision makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a "right" to make such an important decision than has the jury.

Id. at 4746.

The essence of the impropriety in Caldwell was the implication in the prosecutor's argument that the jury did not have the primary responsibility for deciding whether the death sentence was appropriate but, rather, that the jury had a duty to impose the death sentence in order to give effect to the decision of other authorities who were better able to judge the appropriateness of that penalty. Such authorities might include not only the justices of a state supreme court but also the prosecutor, grand jury, or police.

In the present case the prosecutor argued not only that a noted state supreme court justice had already determined that the death penalty was appropriate for the defendant, but also that the law itself commanded such a sentence. This argument went beyond what the Court condemned in Caldwell. Since the danger that the jury might choose to minimize the importance of its role was at least as high in the present case as it was in Caldwell, the analysis the Supreme Court used in deciding to vacate the

death sentence in Caldwell should control the outcome in the present case. Because we cannot say that the improper arguments in the present case had no effect on the jury's sentencing decision, I dissent.

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YOUNG, District Judge, concurring in part and dissenting in part:

While concurring in the Court's analysis and conclusion on each of the Sandstrom and the closing argument issues, I disagree that the petitioner is entitled to relief based on an alleged Fourteenth Amendment violation because of underrepresentation of women in the sentencing jury pool.

As the Court points out, challenges by criminal defendants in state court proceedings to the discriminatory selection of juries have been recognized under the Equal Protection Clause of the Fourteenth Amendment and the "fair cross-section" requirement implicit in the Sixth Amendment right to an impartial jury. The district court below held that Bowen, a male convicted of raping and murdering a twelve year old female, was denied equal protection of the laws in his sentencing because females were underrepresented on the 1977 traverse jury list from which his sentencing jury was selected. The district court thus found it unnecessary to evaluate Bowen's claim under the Sixth Amendment. In affirming the district court, the majority likewise purports to reach only the Fourteenth Amendment question.

In my opinion, both logic and Supreme Court precedent compel the conclusion that Bowen lacks standing to assert, on equal protection grounds, that women were underrepresented in the jury pool. In this regard, I would adopt the reasoning of Judge Gee, writing for the new Fifth Circuit, in United States v. Cronn, 717 F.2d 164 (5th Cir. 1983). Petitioner's own equal protection rights obviously were not violated in this case by the alleged underrepresentation of women, and there is no

justification for permitting jus tertii standing. Id. at 169-170.

I recognize that this Circuit has reached a contrary result in a line of cases beginning with United States v. Perez-Hernandez, 672 F.2d 1380, 1385-86 (11th Cir. 1952), which, like Cronn, involve equal protection challenges to the selection of the grand jury foremen. See also United States v. Holman, 680 F.2d 1340, 1355-56 (11th Cir. 1982); United States v. Cross, 780 F.2d 631, 633-34 (11th Cir. 1983); United States v. Sneed, 729 F.2d 1333, 1334 (11th Cir. 1984). The Fifth Circuit in Cronn persuasively points out that the "apparent conflict" among recent Supreme Court decisions, which this Court perceived in Perez-Hernandez, stems from a misreading of Justice Marshall's plurality opinion in Peters v. Kiff, 407 U.S. 493 (1972). The Peters opinion did not discuss standing "in an equal protection context," as Perez-Hernandez states (672 F.2d at 1385); indeed, the Peters Court did not reach the equal protection issue. 407 U.S. at 497 n.5. The discussion of standing in Peters pertains, rather, to grand jury composition challenges under the due process clause which -- like Sixth Amendment, fair cross-section challenges to petit jury composition -- may be raised by any criminal defendant, regardless of his circumstances. Id. at 504. See Cronn, 717 F.2d at 167-68, and nn. 4 and 6. Chief Justice Burger's dissent in Peters noted: "While the opinion of Mr. Justice Marshal refrains from relying on the Equal Protection Clause, it concludes that if petitioner's allegations

are true, he has been denied due process of law." 407 U.S. at 509. In United States v. Cross, 708 F.2d at 633 n.4, this Court acknowledged that the Peters plurality opinion "analyzed the exclusion of blacks from grand jury service as a violation of due process." (Emphasis added).

On the other hand, in the equal protection cases of Castenada v. Partida, 430 U.S. 482, 494 (1977), and Rose v. Mitchell, 443 U.S. 545, 565 (1979), the Supreme Court unequivocally stated that

> "in order to show an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or the identifiable group to which he belongs."

(Emphasis Added).

But whether Perez and its progeny were decided correctly or not, this panel is bound by it in the absence of a reversal by the Eleventh Circuit en banc or by an intervening contrary decision by the Supreme Court. United States v. Holman, 680 F.2d at 1356 n.11. I construe Hobby v. United States, 468 U.S. ___, 82 L.Ed.2d 260 (1984), as a contrary intervening decision which mandates a re-assessment of the Perez holding.

In Hobby, the Supreme Court evaluated the challenge of a white male to the underrepresentation of blacks and women in the position of grand jury foreman as a due process challenge. In holding that such discrimination would not warrant reversal of

petitioner's conviction and dismissal of the indictment against him, the Supreme Court sought to distinguished its previous ruling in Rose v. Mitchell, supra, as follows:

> "Petitioners' reliance upon Rose is misplaced. Rose involved a claim brought by two Negro defendants under the Equal Protection Clause. As members of the class allegedly excluded from service as grand jury foremen, the Rose defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries. See, e.g., Castaneda v. Partida, 430 U.S. 482 (1977); Hernandez v. Texas, 347 U.S. 475 (1954); Strauder v. West Virginia, 100 U.S. 303 (1880). Petitioner, however, has alleged only that the exclusion of women and Negroes from the position of grand jury foreman violates his right to fundamental fairness under the Due Process Clause. As we have noted, discrimination in the selection of federal grand jury foreman cannot be said to have a significant impact upon the due process interests of criminal defendants. Thus, the nature of petitioner's alleged injury and the constitutional basis of his claim distinguish his circumstances from those of the defendants in Rose.
>
> * * *
>
> Given the nature of the constitutional injury in Rose, the peculiar manner in which the Tennessee grand jury selection operated, and authority granted to the one who served as foreman, the Court assumed in Rose that discrimination with regard to the foreman's selection would require the setting aside of a subsequent conviction, "just as if the discrimination proved has tainted the selection of the entire grand jury venire." Rose v. Mitchell, supra, at 551-552, n.4. No such assumption is appropriate here, however, in the very different context of the due process challenge by a white male to the selection of foremen of federal grand juries."

82 L.Ed.2d at 267-269.

Hobby, then, makes clear and firm the Supreme Court's previously stated requirement that a petitioner seeking to raise an equal protection challenge must be a member of the race or group allegedly underrepresented on juries or grand juries. By implication, one who is not a member of the underrepresented group lacks standing to raise such a challenge.

In addition, Hobby demonstrates that there is a difference in the evaluation of a due process violation claim from that of an equal protection violation claim. Discrimination in selection of a grand jury foreman could be an equal protection violation (Rose v. Mitchell, supra) but would not be a due process violation (Hobby v. United States, supra). Likewise, there may, in some cases of jury composition disparities, be a difference in the results depending upon whether the challenges are examined under the Fourteenth Amendment equal protection standard or the Sixth Amendment fair cross-section standard. Judge Fay has, for this Court, rested his decision solely on the Fourteenth Amendment claim and declined to decide the Sixth Amendment challenge in the absence of findings or a ruling by the district judge on that issue.

For the reasons set forth above, I dissent to Part IV of the majority opinion; I would reverse the district court's grant of a new sentencing trial and would remand for a consideration of the issues unresolved in the district court including, but not limited to, the Sixth Amendment fair cross-section claim.

Names Of Witnesses.	Addresses	Employed By
Mrs. Edith Hill	3040 New Tampa Hwy. Lakeland	Housewife
Mrs. Helen Turman (45) 5-11-28	3070 New Tampa Hwy. Lakeland, Fla.	

Arrest Record— Names	Case Number	Date	Arresting Officers

Personal Property On Body In Possession Of

DETAILED REPORT—Give complete account including story obtained from injured person if in condition to be interviewed. In a felony case obtain statement from complainant and have complainant sign his statement. Also get statement from each witness and signatures. Any report, officer making this report must not fail to state his source of information even though it is his own statement. Commanding officer of all officers is required to determine if victim, or complainant, desires to prosecute and advise them where to obtain warrant.

Mrs. Turman was in her and her husband, James', furniture store, which is located in front of their home at 3070 New Tampa Hwy.; at or about 6:00 p.m., Mr. James Carl Turman, left to go to the house to the south of the store. This left Mrs. Helen Turman alone. She went to the back do south side of store. As Mrs. Turman turned to go back into the store, sh found a colored man standing in the hallway. Mrs. Turman stated she could not remember what the subject looked like or what he was wearing. The subject informed Mrs. Turman that he wanted to buy about $600.00 worth of furniture. Mrs. Turman started to show the subject around the store. The went into what they called the storeroom. At this time, the subject had a gun in his left hand, took Mrs. Turman by the right arm. He was behind h at this time. She turned to her left some and saw a gun in his hand. The subject said at this time, 'do as I tell you and you won't get hurt.' The

four days after the incident. We should have waived the preliminary hearing and demanded a lineup, or simply waived the preliminary hearing. Because of the photograph of Darden in the local newspaper the day after the murder it perhaps would have been advisable to have no lineup.

It most certainly was inadvisable to have the preliminary hearing.

Q Why do you say that was a bad decision? What happened, in other words, at the Preliminary Hearing to prejudice the defendant's trial?

A The widow was especially distraught. She had just come from her husband's funeral the day before. She was brought into a tiny courtroom where there was one black man sitting at the defense table. The prosecutor walked over to him and pointed to him and said, "Is this the man that did it?"

She looked him straight in the eye and said, "That's the man that did it" -- over vigorous objection of Defense Counsel Hill.

Mrs. Turman is a very, I thought, honest witness and honest person. I do believe that had she not seen Darden until the day of the trial, if she didn't recognize him, she would have said something. She should not have been able to see Darden prior to

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.

9-11-73
5:00 p.m.

"Both of these two look a little like him!"

DID HE HAVE A MUSTACHE?

"I don't think so!"

WHAT TYPE SHIRT WAS HE WEARING?

"It was short sleeve. It was something like a red or orange and I think it was a knit material, pale!"

WRITE WHAT IS IN THE FACE PLATE OF THE PHOTO YOU CHOSE?

"Sheriff's Dept.
Bartow, Florida
4644
9 9 73

/s/ Phillip Arnold

Witness: D. R. Neal, Polk County Sheriff's Dept.

C. R. Keeney, Polk County Sheriff's Dept.

Investigating Officers:	Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served on

The Honorable Jim Smith
Attorney General
Elliott Building
Tallahassee, Florida 32301 by hand/~~mail~~

and

Mr. Richrd W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014 by ~~hand~~/mail

this 01 day of September, 1985.

Respectfully submitted

ROBERT AUGUSTUS HARPER, JR.
Law Firm
317 East Park Avenue
Post Office Box 10132
Tallahassee, Florida 32302
904/224-5900

RAHb/

IN THE UNITED STATES COURT OF APPEALS
OR THE ELEVENTH CIRCUIT

NO. 81-5590

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 30 1985
SPENCER D. MERCER
CLERK

WILLIAM JASPER DARDEN

Petitioner-Appellant,
Cross-Respondent,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State
of Florida,

Respondent-Appellee,
Cross-Petitioner,

Appeal from the United States District Court
For the Middle District of Florida

Before GODBOLD, Chief Judge, RONEY, TJOFLAT,* HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.**

O R D E R:

Darden's motion, filed August 29, 1985, to stay the mandate for 30 days and stay his execution pending application for certiorari, is DENIED.

* Circuit Judge Gerald Bard Tjoflat did not participate in this decision.

** Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. § 46(c)

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIE JASPER DARDEN,
Petitioner,
v.
LOUIE L. WAINWRIGHT
Respondent.

CASE NO. 85-~~5139~~ 5319

EXTRAORDINARY
MOTION TO DISSOLVE STAY OF EXECUTION AND
SUGGESTION THAT WRIT WAS IMPROVIDENTLY GRANTED

On September 3, 1985, the Court, voting five-to-four, denied an application for stay of execution filed on behalf of petitioner, Darden. Subsequent to that denial, the Federal District Court for the Middle District of Florida and the Court of Appeals for the Eleventh Circuit likewise denied applications for stay of execution.

Petitioner then requested this Court to treat the previously filed application for stay of execution as a petition for writ of certiorari. The Court then granted the petition, vacated its previous order denying the application for stay, and stayed the execution of the sentence of death pending judgment of this Court.

Now that respondent has had the first opportunity to review and study both the application and the respective orders of this Court, respondent is compelled, not only to move to dissolve the stay of execution, but also to offer the suggestion that the granting of the writ of certiorari was improvidently done. Because of the unusual action of the Court, respondent submits that this pleading is appropriate and that its filing is not without precedent. See, Chambers v. Mississippi, 405 U.S. 1205 (1972) (POWELL, J., in chambers).

Five members of the Court are of the belief that none of the claims contained in the petition for certiorari is possessed of any merit. JUSTICE POWELL recognized this fact, but nevertheless voted to stay the execution sentence because four

Justices voted to grant certiorari and, due to the nature of the case and the geographical scattering of all Justices, JUSTICE POWELL joined in the granting of the application for a stay. It is respectfully submitted that this action was produced by the pressure created by petitioner's last minute effort and perhaps because of this, wrought in oversight of established legal standards.

In perhaps the first writing of JUSTICE POWELL on the subject, the general standards governing the grant of a stay application were stated as follows: there must be a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritoricus for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decisions; and there must be a likelihood that irreparable harm will result if that decision is not stayed. Graves v. Barnes, 405 U.S. 1201 (1972) (POWELL, J., in chambers). These notions were specifically repeated in Times-Picayune Publishing Corporation v. Schulingkamp, 419 U.S. 1301 (1974) (POWELL, J., in chambers) and relied upon by JUSTICE STEVENS in Williams v. Zbaraz, 442 U.S. 1309 (1979) (STEVENS, J., in chambers).

The question of ultimate resolution of the merits of the case has been considered by several Justices of the Court in varying contexts. In denying an application for stay in Corsetti v. Massachusetts, ___ U.S. ___, 104 S.Ct. 10 (1982) (BRENNAN, J., in chambers), JUSTICE BRENNAN provided a two-step process for considering applications for stays. The first was determining whether the so-called "rule-of-four" would be satisfied, and the second was prognosticating whether there was a "fair prospect that a majority of the Court would conclude the decision below was erroneous". Id., at 4 (emphasis added). Predicting the final outcome of the case is a mandatory function. Heckler v. Lopez, ___ U.S. ___, 104 S.Ct. 10 (1983) (REHNQUIST, J., in chambers). The rule-of-four reflects the policy of granting a stay only when the losing party

presents substantial contentions which are likely to prevail on the merits. Holtzman v. Schlesinger, 414 U. S. 1304 (1973) (MARSHALL, J., in chambers). It has been said that the predicting of whether four Justices would vote to hear the case and whether five Justices would be likely to reverse the case below is something which is not possessed of any mathematical certainty. If it is believed that the process has been miscalculated, a motion to vacate a stay addressed to the full Court is allowable. New Motor Vehicle Board of California v. Orrin W. Fox Company, 434 U. S. 1345 (1977)(REHNQUIST, J., in chambers). This is precisely the objective of the instant pleading.

Petitioner initially presented the Court with three grounds for staying his execution. The first was the much offered and litigated issue surrounding the prosecutor's closing argument. Noting the current struggle with the issue by the Eleventh Circuit Court of Appeals and the decision in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985), petitioner claimed that what the prosecutor said over a decade ago now represents an Eighth Amendment violation. He contended that Caldwell, supra, established an entirely new standard of review for closing arguments vis-a-vis the Eighth Amendment and if that standard is applied to the facts in his case, he will conclusively demonstrate that he is entitled to relief. In response, we state that Caldwell v. Mississippi, supra, is not a closing argument case; it is a capital sentencing case involving the Eighth Amendment. Although the Eighth Amendment ramifications were established and developed by virtue of a statement made during a prosecutor's closing argument, the case has nothing to do with establishing any new standard of reviewing allegedly inflamatory and prejudicial remarks made during the guilt phase of a capital trial.

Regardless of what constitutional label petitioner attaches to the issue, the fact remains that the question of whether the prosecutor's closing argument deprived him of a fundamentally fair and constitutional trial has been carefully

reviewed and litigated by every single court available to him. This fact should weigh heavily against petitioner when considering a stay of execution of sentence, even if the sentence happens to be one of death. See, Bloeth v. New York, 369 U.S. 133 (1962) (HARLAN, J., in chambers), Rosoto v. Warden, California State Prison, 374 U.S. 202 (1963) (HARLAN, J., in chambers).

Moreover, in Maggio v. Williams, ___U.S. ___, 104 S.Ct. 311 (1983), a case which could be considered as presaging Caldwell, supra, JUSTICE STEVENS reviewed the remarks of the prosecutor and concluded that they were prejudicial because they misstated the law and may have led the jury to discount their grave responsibility in a capital case. Despite that conclusion, JUSTICE STEVENS noted that since the issue was raised in a prior proceeding questioning the competency of trial counsel--who failed to object to the argument when it was made--the Court was justified in applying a strict standard of review to the second federal habeas corpus application. 104 S. Ct. at 316, STEVENS, J., concurring. Here, just as there, there exists a failure to object to the allegedly inflamatory remarks of the prosecutor. Much more, the reason for the lack of objection is now known to have been a deliberate and tactical choice specifically made by trial counsel in an effort to create per se reversible error--that which is, and has been, petitioner's chief assertive position.

Having been unable to convince any court of the idea that he was deprived of a fair trial on guilt, petitioner now switches tack and offers the belief that remarks never held to be constitutionally improper somehow spilled over into the sentencing proceedings--a claim he must make in order to even remotely come under Caldwell's protection. Regardless of the current form of the claim, petitioner cannot escape the inevitable: the remarks deprived him of no constitutional right.

Petitioner also presents a basis for review which concerns the so-called Witherspoon issue. As this Court knows, the resolution of this issue by the Eleventh Circuit Court of

of Appeals was most recently done in direct response to this Court's remand. It cannot be seriously contended that the resolution of the Witherspoon issue was not done in absolute compliance with the principles announced in Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985).

There, this Court specifically held that the statutory presumption of correctness in 28 U.S.C., section 2254 (d), applies to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause. Given the requirement of deference required by Witt, when the trial judge in the instant cause told venireman Murphy that he would be excused, section 2254(d) was satisfied as the statement represented a finding of fact equivalent to or greater than the direction, "step down", in Witt.

Left remaining on this issue is consideration of whether the presumption of correctness is fairly supported by the record, viewed as a whole. To make this determination, it is first necessary to keep in mind the standard announced in Adams v. Texas, 448 U.S. 38 (1980) and reaffirmed in Witt: whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. In Witt, Juror Colby could only offer her thought that religious or personal beliefs might interfere with judging the guilt or innocence of the defendant. That brief exchange has been delcared by this Court to be: a factual finding of bias; a factual finding presumtively correct; a factual finding fairly supported by the record; and one applying the proper standard of law.

Comparing the colloquy in Witt with one in this case, it is noted that Colby offered her belief of possible interference without any consideration to the evidence which might be produced. Here, Murphy was asked about his principles in opposition to the death penalty which would be violated to the extent that he would be unable to vote to recommend the death penalty regardless of the facts. Colby was asked only about her general, religious or personal beliefs. Murphy was asked about

those principles, and others, and whether they were "so strong". Colby only thought her beliefs would interfere; Murphy was positive that his principles would be violated.

Does not the doing of an act which violates very strong moral, religious, or conscientious principles perfectly represent the "prevention or impairment" of a juror's duties in accordance with his instructions or oath? Though rhetorically posed, the answer to this question is unqualified "yes". Beliefs are synonomous with principles; "Yes" is more forceful than "I think so". Also, as in Witt, counsel for petitioner did not object to the excusal of Murphy nor was any further questioning apparently deemed necessary. While there many have been a continuing objection, it was one generally directed to the entire concept of excusing jurors who were in any way opposed to capital punishment. There was neither specific objection to the particular people who were excused on the grounds that they insufficiently demonstrated their opposition to capital punishment nor any effort to delve further into their views.

For the court of appeals to have decided the Witherspoon issue in any way than it ultimately did would have violated the principles of Witt and would have resulted in another vacation of judgment and remand for yet further consideration.

The third basis petitioner presented for relief was the allegation that counsel believed that Florida law restricted presentation of mitigating evidence to that enumerated in the statute. This particular claim is predicated on absolutely false information. On page 33 of the application, petitioner states that he was represented by Mr. Maloney, who had been licensed for four months, and who had never seen, much less tried a capital case. That is true. He says that there was co-counsel, a Mr. McDaniel, who had never tried a capital case. This is false and demonstrates the ends to which someone will go to avoid the imposition of sentence.

Mr. Maloney was nothing more than a legal intern in the public defender's office in 1974, and was assigned to assist Mr. Goodwill (McDaniel was the prosecutor). Maloney's

primary if not sole duty was to assist trial attorney, (HC 162), Mr. Goodwill (HC 166). We do not know why petitioner has attempted to continuously mislead courts in this regard, but if there is an opportunity to get the record straight, let it be now. Maloney was not petitioner's lawyer, he was the lawyer's helper.

The Public Defender of the Tenth Judicial Circuit, Jack Johnson, testified at the habeas corpus hearing that Maloney was assigned to be the assistant to Mr. Goodwill (HC 206). He appointed Goodwill as lead counsel because Mr. Goodwill had experience in capital cases (HC 221). Mr. Goodwill testified at that same hearing that he was admitted to the bar in 1965 (HC 273). In the time between his admission to practice and petitioner's trial he primarily practiced criminal law. In one year alone, he had thirteen or fourteen capital cases assigned to him (HC 279).

Maloney was called as a witness on behalf of Darden at the habeas corpus hearing for the purposes of opining that Darden received ineffective assistance of counsel in practically every conceivable manner, and to provide support for the serious and many charges of ineffectiveness leveled at Goodwill. While it is true that Maloney testified that no attempt to investigate or present evidence outside the statute was made, Goodwill, lead counsel, pointedly told Darden at trial that he had the absolute right to take the stand and tell the jury anything at all in mitigation (State trial record, vol. VIII p. 883). Goodwill knew of nothing he could have produced in mitigation, statutorily enumerated or otherwise. Goodwill did not feel limited, the trial judge was obviously not limited, and the absolute lack of merit in this claim is patently clear.

In dissenting from the denial of the application for stay of execution, JUSTICES BLACKMUN and STEVENS were of the opinion that a stay should be entered since the Court had not yet had an opportunity to review the denial of the first petition for federal writ of habeas corpus. A stay of execution would enable the Court to consider whether to grant certiorari

in the normal course of business. What may have been overlooked is the fact that when the court of appeals initially resolved the Witherspoon issue in petitioner's favor, the State of Florida sought and received a writ of certiorari on that issue. The remaining issues which were decided against Darden were made the basis of a cross-petition for writ of certiorari. It was denied by an apparently unanimous Court. Darden v. Wainwright, ___ U.S. ___, 104 S.Ct. 2688 (1984). Thus, the "opportunity to review the denial of applicant's first petition for federal habeas coprus..." was provided the Court in 1984. The cross-petition was filed in April of 1984 and denied in June of that same year. That period of time certainly suggests that consideration of whether to grant certiorari was conducted in the "normal course of business". It was the cross-petition which provided this petitioner with a right of review, the right which, it has been stated, every defendant in a state court of this Nation possesses. See, McDonald v. Missouri, ___ U.S. ___, 104 S.Ct. 567 (1984) (BLACKMUN, J., in chambers).

We presume that the basis of dissent shared by JUSTICES STEVENS and BLACKMUN is what carried over to the decision to grant the writ. In light of the above, it is respectfully suggested that the basis was non-existent. If so, then the rule-of-four was improvidently satisfied. Given these circumstances, it is respectfully suggested that reconsideration of the vote to grant certiorari is both prudent and necessary. The unique process which this case went through while in this Court represented yet another example of last minute activity which this Court has universally condemned. There should be little doubt that absolutely nothing had changed between petitioner's application for stay and his petition for writ of certiorari, save the label he attached thereto. To have once denied relief and then granted relief based on the identical pleading a few hours later is unique and unprecendented. On another occasion, JUSTICE POWELL has deemed the attempt at a similar enterprise as "the sort of procedure which undermines public confidence in the courts and in the laws which

we are required to follow". Stephens v. Kemp, ___ U.S. ___, 104 S.Ct. 562, 565 (1983) POWELL, J., dissenting.

To ultimately grant the writ in a case which has previously been before the Court on more than one occasion is one thing. To grant the writ in a case which five Justices have already determinedhas no chance of ultimate success is quite another. A rule-of-five should prevail over a rule-of-four. This is especially compelling since resolution of the issues appears headed towards a foregone conclusion.

We hope to have demonstrated that the writ was improvidently granted. Even if what we believe to be the factual predicate of the votes of JUSTICES STEVENS and BLACKMUN is incorrect, the announcement by JUSTICE POWELL that he perceives absolutely no merit in the claims should be sufficient motivation to reconsider the grant, and ultimately deny the writ. If this case proceeds to plenary review, the very most that will or can be accomplished, regardless of the ultimate ruling, is an adjudication of the respective rights of the litigants. There exists neither conflict nor important question of potential national application. In short, no question of federal law is in need of address by the Court.

Neither the writ nor the stay of execution should have been granted and based on the above, respondent respectfully moves dismissal and dissolution respectively.

Respectfully submitted,

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LOUIE L. WAINWRIGHT,

Respondent.

85-5319

CASE NO. 85-5139

PETITIONER'S RESPONSE TO EXTRAORDINARY
MOTION TO DISSOLVE STAY OF
EXECUTION AND SUGGESTION THAT
WRIT WAS IMPROVIDENTLY GRANTED

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I. INTRODUCTION

On September 3, 1985, the Court granted Mr. Darden's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Respondent has now alleged that this Court's decision to allow full briefing and a studied resolution of the issues presented in the certiorari petition, was "wrought in oversight of established legal standards,"[1] and claims that "[a] rule of five should prevail over a rule of four." See Extraordinary Motion to Dissolve Stay of Execution and Suggestion that Writ was Improvidently Granted, pp. 2 and 9 (hereinafter "Extraordinary Motion."). Additionally, according to Respondent, the Court was "mislead" and provided with "false information,"[2] and consequently crumbled under "the pressure created by Petitioner's last minute effort" to seek review of his first habeas petition.[3] (Extraordinary Motion, p. 2, 6, and 7).

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[1] As is discussed below, the Court in fact followed time-honored and tested legal standards in its action. Contrary to the State of Florida's derogatory characterization, the Court acted prudently in response to a crisis situation precipitated by the advice of the Department of Legal Affairs, State of Florida, to the Governor to sign Petitioner's death warrant while a stay of execution ordered by the Eleventh Circuit was in effect.

[2] Petitioner was described as having predicated an entire claim "on absolutely false information." (Extraordinary Motion, p.6). Respondent thus seems to be accusing counsel of flat-out lying to obtain a stay. Id. Such shocking (and meritless) accusations, while perhaps reflecting only "sour grapes," are more likely an attempt to incite uncritical wrath from the Court, and thereby to deflect and short-circuit the Court's merit appraisal of the issues. The State's indecorous comments are briefly rebutted at fn. 10, infra. The State's intemperance was also measured by the district judge. Respondent earlier accused the magistrate of fabricating the Witherspoon issue.

[3] Any pressure was created by Respondent. Petitioner created no pressure. The Eleventh Circuit denied rehearing in this first habeas petition August 27, 1985. The State, after the Eleventh Circuit decision denying relief on July 23, 1985, but before Petitioner's filing for and the court's denial of rehearing, set Petitioner's execution for September 4, 1985. A petition for writ of certiorari was not (and is not) due in this Court until approximately November 25, 1985. Thus, due only to Respondent's ill-timed attempt to execute Petitioner and thereby to deprive Petitioner of his right to seek certiorari review of the Eleventh Circuit's decision in his case, an emergency petition had to be filed in this Court almost three months before it was due. Respondent has quite simply condemned Petitioner for reacting to the State's itchy trigger finger.

Ironically, in its effort to condemn Petitioner and this Court, Respondent has misconstrued the law relating to provident grants of certiorari, and has misrepresented the history and record in this case. It is as if the State now wishes to accomplish in an angry voice what it was unable to achieve when it spoke in tones of reason.

Since the State is now without the benefit of its haste-producing death warrant power, the allegations raised in its Extraordinary Motion can be carefully dissected and properly dismissed. Petitioner will show that the procedures employed by the Court in granting certiorari were proper and anything but "unusual", "unique", or "unprecendented" [sic]. (Extraordinary Motion, pp.1, 8). Petitioner will also demonstrate, without arguing the merits, that the issues upon which certiorari was granted are truly worthy of plenary consideration.

II. THE COURT CORRECTLY FOLLOWED THE "RULE OF FOUR."

Respondent asserts that the Court should not have granted certiorari because this is a case which "five justices have already determined has no chance of ultimate success. . . . A rule of five should prevail over a rule of four." (Extraordinary Motion, p.9). In addition, the State argues that even if certiorari were appropriate, a stay of execution should not have been granted when five justices did not believe merit review would result in reversal. Id. Both of these propositions stem from a fundamental misunderstanding of the purposes and processes of certiorari review. Respondent has confused the proper standards for a stay by a single Justice, acting as Circuit Judge, with the proper action when the full Court acts upon a request for stay, after four members have voted for certiorari review.

In the first three pages of Respondent's Extraordinary Motion, a catalog of single Justice (Circuit Justice) opinions and orders on stay requests is presented. Respondent correctly points out (in non-capital cases) the test which must be met

before a single Justice should issue a stay of a lower court's judgment pending certiorari or appeal to the Court:

> The first [step] was determining whether the so-called 'rule of four' would be satisfied, and the second was prognosticating whether there was a "fair prospect that a majority of the Court would conclude the decision below was erroneous."

[Extraordinary Motion, p.2 (citations ommitted)]. Respondent concludes that if five Justices would not be likely to reverse, a stay should not be entered.

By contrast, in this case "four justices have voted to grant certiorari. . . ." Darden v. Wainwright, No. 85-5319 (A-181), slip opinion at 1 (September 3, 1985) (Powell, J., dissenting). This was not a single-justice decision. The difference is crucial, and what makes it crucial is the rule of four.

The misrepresentation in Respondent's argument is that it is posited that the seven single-Justice chambers decisions cited provide, and according to Respondent have always provided, the framework for analysis when the whole Court acts or has acted. Respondent's subsequent analysis of the certiorari and stay issues, under a five-Justice set-up, is tainted and unpersuasive.

The jurisprudential differences between single-Justice stays pending certiorari, and grants of certiorari under the rule of four, underscore why the State's position is so wrong. When a single Justice acts on stay requests, he or she acts in a trustee status. As expressed by Justice Marshall, in a decision relied upon by Respondent, special deference to the views of the entire Court is proper when a single Justice acts:

> [T]he Supreme Court is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices. It follows that when I sit as a Circuit Justice, I act not for myself alone, but as a surrogate for the entire Court, from whence my ultimate authority in these matters derives.

Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., Circuit Justice). It is from this relationship that the so-called rule of five arises. A Justice must attempt to act

as the Court would act. See Heckler v. Blankenship, ___ U.S. ___, 104 S.Ct. 966 (1984) at 967 (O'Connor, J.), citing Gregory-Portland Independent School District v. United States, 448 U.S. 1342, 101 S.Ct. 20, 65 L.Ed.2d 1164 (1980) (Rehnquist, J., on resubmission); Spinkelink v. Wainwright, 442 U.S. 1301 (1979) (Rehnquist, J.).

Because there was no Circuit Justice action herein, respondent's entire argument misses the mark. The Court acted, certiorari was granted, and a stay of execution necessarily followed to preserve this Court's jurisdiction over the action and to prevent Respondent from mooting the certiorari issues by executing Petitioner.

Stripped of its misinterpretation of the single Circuit Justice opinions, see Schlesinger v. Holtzman, 414 U.S. 323 (1973), Respondent's argument is simply that the rule of four is a bad rule, largely because it kept the State of Florida from executing Petitioner due to "last minute activity." It is incongrous to fault the Court for adhering to the foundational recognition that when four members of the Court wish to grant certiorari review, the Court hears the case. Whether the Court adheres to its time-honored and tested operating procedures despite, or because of, the crisis created by Respondent, the Court should be commended rather than condemned, and should reject Respondent's attack, rather than retreat as requested. Since it is Respondent's apparent desire to bully the Court out of the rule-of-four in death penalty cases, an affirmation of the purpose of the rule is in order.

When the Court's discretionary certiorari jurisdiction was expanded in 1925, Congress was promised that the increase in discretionary review did not foreshadow the end of full court review. Harris v. Pennsylvania Road Co., 361 U.S. 15, 18n. 2 & 3 (1959). To assure Congress that the Court did and would protect against "a possible abuse of its own discretion," see Mr. Justice Burton, Justice is Also Administration, 33 A.B.A.J. 1,

1099, 1164 (1947), and a consequent heavy curtailment of full review of cases, the Court explained to Congress that a minority of the Court was all that was needed for a case to receive plenary consideration:

> We do not grant or deny these petitions merely according to a majority vote. We always grant the petition when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.

Harris, 316 U.S. at 18n. 3 (quoting H.R. Rep. No. 1075, 68th Cong., 2d Sess., p. 3, testimony of Justice Van Devanter). See also Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957) (Harlan, J., concurring in part and dissenting in part). This "promise to Congress," Harris, 316 U.S. at 18 (Douglas, J., concurring) made the placement of vast discretion in the Court to hear or reject cases "tolerable." Id.

The rule of four is, however, much more than a contract with Congress; it stands alone on a sound jurisprudential footing, and Congress was merely informed of the practice, not the philosophy. As Justice Marshall stated in Holtzman v. Schlesinger, supra, this Court is "a collegial institution," and it is charged with directing, as in this case, the resolution of dramatically important, and controversial, issues of constitutional stature over which reasonable jurists, as well as the public at large, differ. Without a controversy, a case would not make it here. This Court, through its rule-of-four, has guaranteed that the "minority view," Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 529 (1957) (Frankfurter, J., dissenting), will frequently control the Court's docket, by way of a highly reasonable and practical presumption: "if four Justices find that a legal question of general importance is raised, that is ample proof that the question has such importance." Id. See also Blumstein, J., The Supreme Court's Jurisdiction -- Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. R. 895, 920 (1973) ("the

rule of four seems implicitly related to minority control of the docket").

Respondent wants majority rule of this Court's docket, as well as majority rule in this Court's opinions. Respondent's reasoning is that "[f]ive members of the Court are of the belief that none of the claims contained in the petition for certiorari is possessed of any merit," and "resolution of the issues appears headed towards a foregone conclusion." (Extraordinary Motion, pp. 1 and 9). Accepting, without conceding, the truth of these assertions, Petitioner notes that certiorari was granted because only five Justices were opposed to it, and Respondent's topsy-turvy logic is that now the Court should dismiss the certiorari grant for the very same reason. Since four members of this Court favor certiorari, Petitioner can now proceed, through full briefing and argument, to alter that "foregone conclusion" touted by Respondent. Respondent's complaint is nothing more than a description of the rule-of-four, and the rationale for change is that Respondent lost the vote.

The remedy urged by Respondent is specious: whenever the rule-of-four works as it was planned, the majority of the Court can simply enter an order dismissing the grant of certiorari. This procedural veto is not the purpose of a dismissal of the writ as having been improvidently granted[4], and it is only the integrity of this Court that forestalls such coy tactics. As a matter of policy, the Court does not use majority rule to

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[4] A grant of the writ of certiorari is dismissed as having been improvidently granted only when some important consideration has changed since the granting of certiorari:

> After certoriari has been granted, it may become apparent to the Court upon oral argument and upon further study that the basis upon which review was permitted is in fact nonexistent. "Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present in the record at the time of granting
> (Footnote Continued)

summarily defeat the rule-of-four. See Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 559 (1957) (Harlan, J., concurring in part and dissenting in part) ("I think the Court should not have taken any of these cases. Nevertheless, the cases having been taken, I have conceived it to be my duty to consider them on the merits, because I cannot reconcile voting to dismiss the writs as 'improvidently granted' with the Court's 'rule-of-four.'"); Sentilles v. Inter-Caribbean Shipping Corp., 316 U.S. 107, 111 (1959) (Stewart, J., concurring) ("Cases like this, I am convinced, do not belong in this Court. . . . Yet under our rule, when four members of the Court vote to grant a petition for certiorari, the case is taken. If this rule is not to be frustrated, I can . . . see no escape from the duty of considering a case brought here on the merits."); New York v. Uplinger, 104 S.Ct. 2332, 2334 (1984) (Stevens, J., concurring) ("As long as we adhere to the Rule of Four, four Justices have the power to require that a case be briefed, argued, and considered at a post-argument conference.").

This very policy was applied in Donnelly v. De Christoforo, 416 U.S. 637 (1974), and provided Respondent with the majority

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(Footnote Continued)

> the writ, only later indicates that the grant was improvident." The Monrosa v. Carbon Black, Inc., 359 U.S. 180, 184. As stated by Mr. Justice Frankfurter in Armstrong v. Armstrong, 350 U.S. 568, 572, "[a]fter a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the preliminary examination of the questions that were urged in the petition for certiorari." Belcher v. Stengel, 429 U.S. 118. Or a change in circumstances since the writ was granted may have lessened the importance of the case. Thus in Quinn v. Muscare, 425 U.S. 560, the writ was dismissed because the principal question raised had been determined by the Court in another case, and the procedural objection had as a practical matter been remedied for the future by a change in the administrative regulation.

R. Stern & E. Gressman, Supreme Court Practice 369-370 (5th ed. 1978).

opinion which is now claimed to be controlling with regard to Petitioner's prosecution closing argument issue. There was a six Justice majority in Donnelly, but two of the six wrote separately to explain why they joined the Court's opinion:

> I think it was a mistake to grant a writ of certiorari in this case, and I would now dismiss the writ as improvidently granted.
>
> We are bound here, however, by the "rule of four." That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court.

416 U.S. at 648 (Stewart & White, J.J., concurring).

And so it is here, yet Respondent urges the majority to overpower the rule-of-four, even before briefing and argument. If the rule-of-four is strong enough to require adherence upon merits review, summary dismissal is especially improper. Cf. Pennsylvania v. Mimms, 434 U.S. 106, 124 (1977) (Stevens, J., dissenting) ("[T]his kind of [summary] disposition gives rise to an unacceptable risk of error and creates 'the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights.'") (citations omitted); Leis v. Flynt, 439 U.S. 438 (1979) (Stevens, J., dissenting).

Respondent is wrong. The Court's action in granting certiorari, and a stay to preserve it, was not "wrought in oversight of established legal standards."[5] (Extraordinary Motion, p. 2). The principles relied upon by Respondent may be sound when a Circuit Justice acts, but have no application here.

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[5] Respondent was more complimentary (but still inaccurate) in its descriptions of this Court's actions in Darden contained in their Motion to Vacate Stay of Execution in Florida v. Booker, ___ U.S. ___ (1985). In their pleading, the State noted that "in Darden ___ U.S. ___, No. 85-5319 (U.S. Sept. 5, 1985), a sharply divided Court created a plausible likelihood that four Justices would vote to grant certiorari or even reverse."

A rule-of-five has no place in this Court's certiorari jurisprudence, and Respondent's request for it in cases set for execution suggests a heartiness for majority control that is truly unsettling.

III. THE ISSUES UPON WHICH CERTIORARI WAS GRANTED ARE WORTHY OF THIS COURT'S CONSIDERATION

Petitioner has twice before petitioned this Court for a writ of certiorari. That fact should have absolutely no bearing upon whether the issues, as presently presented, merit review.

The first petition for certiorari was granted from direct appeal of the Florida Supreme Court's decision; this petition was later dismissed. A denial of certiorari from this Court on a federal claim raised in a state proceeding has no legal effect or precedential value on the merits. Brown v. Allen, 344 U.S. 443, 488-95 (1953) (Frankfurter, J., for a majority of the Court).[6] Thus, this Court has frequently granted habeas corpus relief on federal claims that were raised earlier in certiorari petitions denied by this Court. See, e.g., Shephard v. Maxwell, 384 U.S. 333 (1966); Townsend v. Sain, 372 U.S. 293 (1963); Irwin v. Dodd, 366 U.S. 717 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Leyra v. Denno, 347 U.S. 556 (1954); Moore v. Dempsey, 261 U.S. 86 (1923); see also Knapp v. Arizona, 435 U.S. 908 (1978) (Blackmun, J., concurring).

The second petition for a writ of certiorari denied by this Court was in fact a conditional cross-petition for writ of

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[6] An order dismissing the writ as having been improvidently granted is not a decision on the merits, and has no more precedential value than a simple denial of certiorari. Darden v. Wainwright, 513 F.Supp. 947, 950 (M.D.Fla. 1981). Hughes Tool Co. v. Trans World Airlines, Inc., 407 UU.S. 363 (1973). A dismissal means only "that conditions originally thought to justify granting the writ of certiorari are not in fact present," Burrell v. McCray, 426 U.S. 471, 473-74 (Brennan, J., dissenting), so the writ should not have been granted ab initio. Thus, the first grant of certiorari in this case has no precedential force.

certiorari.[7] Its denial has no precedential value, and it is Petitioner's contention that this Court's consideration of that petition was muted by the decision to grant the State's petition for writ of certiorari and summarily vacate the case. Petitioner was granted relief by the en banc Eleventh Circuit Court of Appeals, and the State sought certiorari review. Petitioner sought review "if and only if Wainwright's petition in No. 83-1613 is granted." It was Petitioner's clear-cut explicit intent to request full hearing upon the issues he had lost only if this Court provided a full hearing to the State on the Witherspoon issue he had won. In short, Petitioner requested certiorari review only if there was plenary consideration of the State's request -- he had no other reason to seek certiorari; he had won.

No plenary consideration occurred. The State's petition was granted, but the case was vacated for further consideration in light of Wainwright v. Witt, ___ U.S. ___ , 105 S.Ct. 844 (1984). Once the Court vacated the case, there was no need to fully consider Petitioner's cross petition for certiorari; the condition precedent for such review did not occur. The proper time for full review is now. The Court's prior action on the conditional cross certiorari request in no way undermines Petitioner's contention that review is now proper. A conditional cross-petition filed out of an abundance of caution is nothing short of a nullity when this Court summarily remands the entire case to the lower court.[8]

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[7] "[A] party may not desire the Court independently to review the portions of the judgment which are unfavorable to him, but may believe that review should encompass the whole case if his opponent's petition for certiorari is granted. Such a party may appropriately file a conditional cross-petition which he will ask to have granted only if the opposing petition is granted." R. Stern & E. Gressman, Supreme Court Practice 477-78 (5th Ed. 1978) (footnote omitted).

[8] Petitioner has no way of knowing for sure why his conditional petition for certiorari was denied. In light of the Court's action on the State's petition, however, an educated guess is (Footnote Continued)

The issue now is whether the following issues are worthy of this Court's consideration upon full briefing and argument. Petitioner will briefly outline the facts and the issues, and will generally address the question of why this Court should address and resolve the claims in plenary fashion.

A. THE PROSECUTOR'S CLOSING ARGUMENT CREATED AN UNACCEPTABLE RISK THAT THE DEATH PENALTY IN THIS CASE WAS METED OUT ARBITRARILY

Petitioner's guilt of first-degree murder was a close jury question: The sole evidence of guilt was cross racial identifications.[9] The prosecutor's closing arguments came immediately after Petitioner had, in the words of the trial judge, "emotionally, and with what appeared on its face to be sincerity, proclaimed his innocence" before the jury.[10]

(Footnote Continued)
possible. The Court granted the State's petition for writ of certiorari in Wainwright v. Witt, 104 S.Ct. 2168 (1984) on April 30, 1984. Witt involved a Witherspoon issue similar to the one upon which the en banc Eleventh Circuit granted relief to Mr. Darden. The State's petition for certiorari in this case was filed after certiorari had been granted in Witt. This Court ultimately reversed the Eleventh Circuit decision in Witt, granted the State's petition for writ of certiorari in Darden, and vacated in light of Witt. It is not unreasonable to assume that at the time Mr. Darden filed his conditional cross-petition, this Court was aware that the course of litigation herein would be controlled by Witt, and consequently denied the conditional cross-petition summarily.

9 "The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eyewitness testimony of the victims. All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony." Darden v. Wainwright, No. 79-566 Civ.T-H, opinion at 22 (M.D. Fla. April 10, 1981) (Magistrate's Report and Recommendation), recommendation that writ issue based on prosecutorial misconduct rejected by district court, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981).

10 Petitioner has extensively outlined in his Petition for Writ of Certiorari the tenuous foundation upon which the guilt verdict rests, which leaves the innocence question open. Petition, pp. 16-21. Innocence is a troubling issue in the case. For instance, the eyewitnesses were engaged in incredibly suggestive identification procedures by the State. The victim's widow identified Mr. Darden when he was the only black in a small courtroom, after the prosecutor walked over to Petitioner, (Footnote Continued)

Respondent does not and cannot deny that it was in these guilt/innocence arguments that the State demanded the death penalty. See Darden v. Wainwright, 513 F.Supp. 947, 953 (M.D. Fla. 1981) ("[At guilt/innocence] he was also making in effect, his principal argument in support of the death penalty."); Darden v. Wainwright, ___ F.2d ___, No. 81-5390, at 1n.2 (11th Cir. August 27, 1985) (Clark, J., dissenting from denial of petition for rehearing) ("[T]he prosecution made its sentencing argument at the guilt/innocence phase."). After closing argument and conviction, no further evidence was presented, although Petitioner did make a brief closing statement to the jury. The prosecutor's guilt/innocence closing arguments did not dissipate before the jury considered sentencing.

There is no argument about whether the closing arguments

(Footnote Continued)
pointed at him, and said "Is that the man that did it?" Id. at 17. She had earlier told police "she could not remember what the suspect looked like or what he was wearing." Id. She identified Petitioner at trial as her assailant. The other eyewitness was shown six photographs while he was in the hospital, and he understood that the pictures were shown to him "to identify the person that shot me. . . ." He chose two pictures that "look[ed] a little like him," and finally selected one picture: the only one with a name on a white tag -- Darden. Id. at 18. Petitioner urges the Court to review the skimpy evidence upon which guilt is predicated. Id. at 16-21.

Into this dearth of evidence stepped the racial issue. The jury was specifically asked whether they could "try Mr. Darden as if he was white." Id. at 16. The closing argument substituted vitriolic rhetoric for evidence, leading the magistrate below to conclude:

> In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was prejudiced against Darden by the argument. The state has failed to demonstrate, beyond a reasonable doubt, that the prosecutor's comments did not contribute to Darden's convictions.

were egregiously improper: every court which has examined the arguments has condemned them as fundamentally and outrageously improper.[11] The only issues are whether the arguments were prejudicial and what prejudice test applies and. The prejudice test, and its application, warrant certiorari review.

While Respondent is correct that the prosecutorial misconduct argument has been rejected by the courts, the rejection has not been as wholehearted as suggested. Extraordinary Motion, pp. 3-4. Two Justices of the Florida Supreme Court would have reversed the conviction, without even examining the effect on sentencing. Darden v. Wainwright, 329 So.2d 287, 291 (Fla. 1976) (Sundberg & England, J.J., dissenting). The magistrate below similarly recommended reversal of the conviction, Darden v. Wainwright, No. 79-566 Civ. T.H. (April 10, 1981) (Magistrate's Report and Recommendation), as did a dissenter from the panel opinion of the Eleventh Circuit. Darden v. Wainwright, 699 F.2d 1031, 1040 (11th Cir. 1983) (Clark, J., dissenting). The en banc Eleventh Circuit decisions did not critically analyze the panel decision on closing

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[11] The state has wisely yielded: "No one has ever really suggested that McDaniel's closing remarks were anything but improper. . . ." Respondent's Supplemental Answer, p. 12, quoted in Magistrate's Report and Recommendation. The district court characterized the argument as a "tirade" containing "blatant expression of a personal opinion" and "a series of utterly tasteless and repulsive remarks" 513 F.Supp. at 953, 955:

> Anyone attempting a text book illustration of a violation of the Code of Professional responsibility, Canon 7, EC 7-24 and DR 7-106(C)(4) could not possibly improve upon [the prosecutor's] example.

513 F.Supp. at 955. The majority panel decision in 1983, which is the en banc court's opinion, similarly condemned the arguments "as tasteless and unprofessional," which "contained personal opinions," and "would have been reversible error on appeal from a federal criminal case." 699 F.2d 1031, 1035-36. Like the district court, however, the majority opinion concluded (without discussing the Eighth Amendment) that the arguments were harmless. Even the majority opinion in the Florida Supreme Court recognized that "the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility. . . ." 329 So.2d at 290.

argument, but merely adopted it, because the Witherspoon issue took control of the case and its litigation. Consequently, every court that has given studied attention to the closing argument issue has split on the question of prejudice.

The problem is Donnelly v. DeChristoforo, 416 U.S. 637 (1974). As noted, a string of judges in the case sub judice have come to different conclusions applying the Donnelly test, which is a clear demonstration of the case's unsuitablity for fragile death penalty analysis, where reliability is the key. Petitioner believes that this case provides an appropriate vehicle for an analysis of Donnelly and its application in a capital case setting. As will be shown, Donnelly has proven ineffective in other cases as well as in protecting defendants from flagrantly abusive and unethical closing arguments, and the proper parameters of the Donnelly prejudice test is a source of confusion in the federal circuit courts.

1. Reliability in Sentencing -- The Central Eighth Amendment Theme

Reliability is and must be the cornerstone of capital sentencing. This Court's capital sentencing decisions have centered around the imperative of minimizing the risk of arbitrary decisionmaking. Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087 (1985); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 874-76 (1982), id., 102 S.Ct. at 878 (O'Connor, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980); Lockett v. Ohio, 438 U.S. 586, 605 (1978). Because death is different from any other punishment, the procedures by which the decision to impose death is made require constitutional limitations not required in other sentencing decisions, see Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982); Gardner v. Florida, 430 U.S. 349 (1977), and procedures which might otherwise be constitutional at guilt/innocence proceedings fall short of the constitutional mark when death may attach to a conviction. Beck v. Alabama, 447 U.S. 625 (1980). Above all, a death sentence cannot survive if the sentence is "imposed out of

whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 102 S.Ct. at 878 (O'Connor, J., concurring).

2. Donnelly is Incompatible With Eighth Amendment Jurisprudence, and is Inconsistently Applied by the Circuit Courts in Habeas Corpus

In Donnelly, this Court adopted what the lower courts have termed a very restrictive test for review of prosecutors' closing arguments under 28 U.S.C. Section 2254. The argument must make the "trial so fundamentally unfair as to deny [petitioner] due process." 416 U.S. at 645. The Donnelly facts are not particularly egregious, and the result is not a surprising or unfair one. The prosecutor had made an ambiguous isolated remark which, through speculation, may have conveyed a false impression that petitioner offered to plea guilty to a lesser charge. The trial court "took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case," and admonished the jury to disregard the comment. Id. at 644. This Court held that under these facts, due process had not been violated.

Federal courts have interpreted Donnelly as a virtual bar to federal habeas relief in a Section 2254 proceeding, an interpretation which, if in fact at odds with Donnelly, should be corrected by the Court. Rule 17.1 (c), Supreme Court Rules. "Indeed, it is notable how often the courts cite improper argument by a prosecutor and how seldom they reverse convictions because of it." United States v. Bess, 593 F.2d 749, 757 (6th Cir. 1979).

The lower courts' interpretations of the specific Donnelly prejudice test varies, but one point is unanimously underlined: the test is "the narrow one of due process." O'Bryan v. Estelle, 714 F.2d 365, 387 (5th Cir. 1983) (emphasis added) (quoting Donnelly, 416 U.S. at 642). Thus, an argument may be "regrettable and should not be repeated," but not be a "crucial, critical, highly significant factor upon which the jury based its verdict of guilty," and so not be a violation of due process.

Whittington v. Estelle, 704 F.2d 1418, 1425 (5th Cir. 1983). Since the Donnelly inquiry "is generally a narrow one," when evidence of guilt is great, "any prosecutorial misconduct cannot be said to have caused the guilty verdict and was harmless beyond a reasonable doubt." Phelps v. Duckworth, 757 F.2d 811, 827 (7th Cir. 1985). Comments which are "consistently disapproved" of pass muster under Donnelly. Soap v. Carter, 632 F.2d 872, 877 (10th Cir. 1980).

The seventh circuit believes Donnelly means that the improper comments must have been "so egregious" that they "changed the result" of trial before due process is violated. United States ex rel Shaw v. DeRobertis, 755 F.2d 1279, 1281, 1282 (7th Cir. 1985). Some decisions even suggest that some super due process violation must occur before any protection is forthcoming under Donnelly:

> Donnelly teaches that in a Section 2254 proceeding more than undesireability or even "universal condemnation" [of an argument] must be shown. . . . [I]t must be shown that the remarks were so prejudicial that they rendered the trial in question fundamentally unfair. 416 U.S. at 643, 94 S.Ct. 1868. Here the claim is simply that the prosecutor's remarks so infected the trial with unfairness as to make the conviction a denial of due process.

Cobb v. Wainwright, 609 F.2d 754, 755-56 (5th Cir. 1980).

Leaving the death penalty question aside for the moment, it is plain that the courts believe Donnelly is a case espousing restriction of the habeas remedy, an interpretation at odds with the facts and result in the case itself: a single relatively innocuous and certainly ambiguous comment was corrected by the trial court in Donnelly and thus did not amount to a denial of due process. This is no wholesale validation and unleashing of improper prosecutor arguments, and this Court should clarify the confusion which has resulted.

More importantly, the application of the Donnelly test in a death penalty setting, at least as Donnelly has been interpreted by the lower courts, is completely unworkable. An outcome

determinative test is simply too big a burden for petitioners to meet, and relief is too restrictive to ensure that closing arguments do not produce death sentences based upon whim, passion, prejudice, or mistake. See Eddings, supra.

The truth of this proposition is demonstrated by the case sub judice. The lower court majority used Donnelly, and denied relief, without once mentioning the death penalty and how the closing argument could have affected that sentence. No Eighth Amendment gloss was placed on the analysis; the penalty was not mentioned, only the conviction. This is quite simply unworkable.

3. Either Caldwell v. Mississippi Provides the Necessary Eighth Amendment Gloss to Donnelly, and Petitioner is Now Entitled to Application of the Caldwell Test, or This Court Should Now Conform Donnelly to Eighth Amendment Standards

Petitioner believes he is entitled to relief even under Donnelly, as have four previous judges in this case. Petition for Writ of Certiorari at 28-30. However, Petitioner also believes that Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), was intended by this Court to provide guidance to lower courts in their treatment of prosecutor closing argument claims in capital cases. If Caldwell was so intended, Caldwell should now be applied to Petitioner's case. Rule 17.1 (c).

In Caldwell, the prosecutor (and judge) had informed the jury that their decision on death was subject to appellate review: "your decision is not the final decision . . . [y]our job is reviewable." 105 S.Ct. at 2646 (O'Connor, J., concurring). In fact, the jurors' decision in Mississippi is presumed correct on appeal, and is thus not subject to ab initio review.

Caldwell argued that "[t]he remarks at issue here divert the jury from focusing on the constitutionally mandated factors relating to the nature of the crime and the background and characteristics of the individual offender." See Brief of Petitioner at 27, Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). He specifically directed the Court to Eighth, not Fourteenth, Amendment law to resolve the issue:

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2990-2991 (1976) (plurality opinion).
>
> See also Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 974 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 98 S.Ct. 2954, 2963-2965 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637, 97 S.Ct. 1993, 1995 (1977); Gregg v. Georgia, supra, 428 U.S. 153, 197, 96 S.Ct. 2909, 2966 (plurality opinion); Proffittt v. Florida, 428 U.S. 242, 251-252, 96 S.Ct. 2966 (1976) (plurality opinion).
>
> The remarks by the prosecutor diverted the jury from meting out the "unique, individualized judgment regarding the punishment that a particular person deserves," Zant v. Stephens, supra, U.S. ___, 103 S.Ct. at 2755 (concurring opinion, Rehnquist, J.). The sentence should be reversed.

Id. at 28.

Respondent, State of Mississippi, directed the Court to "fundamental fairness" due process considerations and argued that review in this Court was restricted to alleged error which "so infected the trial with unfairness so as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974). See Brief of Respondent at 23-24. Respondent in Caldwell cautioned this Court that "not every trial error or infirmity which might on direct appeal of a federal conviction call for an application of a federal appellate court's . . . supervisory powers correspondingly constitutes the denial of due process." Id. at 25.

This Court responded to Donnelly, and embraced Caldwell's Eighth Amendment argument. In so doing, the Court placed a reliability gloss on the restrictive Donnelly rule in capital cases. The Court first underscored that Donnelly "does not

insulate all prosecutorial comments from federal constitutional objections." 105 S.Ct. at 2644. After distinguishing the Donnelly facts, this Court held that "[b]ecause we cannot say that his [argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646.

Thus, under Caldwell, certainly some types of improper prosecutorial comments render a sentencing proceeding fundamentally unfair (per Donnelly) when the comments cannot be said to have had no effect on the delicate and individualized sentencing process.

The Court should specify what types of closing arguments fall under Caldwell. Certainly the argument here is included. The Eleventh Circuit is in turmoil over whether its en banc decisions in Tucker (William) v. Kemp, 762 F.2d 1496 (11th Cir. 1985), Tucker (Richard) v. Kemp, 762 F.2d 1480 (11th Cir. 1985), Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) and Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), comport with the requirements of Caldwell. The Brooks line of cases barely predates Caldwell, and this Court will ultimately receive timely petitions from petitioners in those cases.

The substantive conflict between Caldwell and Brooks is readily apparent: Caldwell requires resentencing after improper prosecutorial argument, unless the state demonstrates that the argument "had no effect on the sentencing decision," 105 S.Ct. 2646; Brooks requires resentencing after improper prosecutorial argument only if there is "a reasonable probability that, but for those arguments, the death penalty would not have been given." 762 F.2d at 1413. The Brooks[12] adoption and application of a Strickland v. Washington

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[12] The Brooks court decided that Strickland v. Washington, 104 S.Ct. 2052 (1984) provided the proper prejudice standard when deciding whether "fundamental fairness" under Donnelly v. (Footnote Continued)

prejudice standard is at odds with Caldwell: the court admitted in Brooks that "[a]lthough we cannot conclude that these few improper remarks had no prejudicial effect on the jury, we are satisfied that the prejudice was not severe." Brooks, 762 F.2d at 1415. If it cannot be said that there was "no prejudicial effect," the Eighth Amendment requires resentencing. Caldwell. This circuit decision conflicts with a decision in this Court. Rule 17.1 (c).

The conflict arose in this manner. On May 31, 1985, the Eleventh Circuit released its en banc decisions in Brooks, Drake, (W.B.) Tucker and (R) Tucker. Brooks was the lead case, and the Strickland prejudice test adopted controlled all four cases. This Court decided Caldwell 11 days later, recognizing that Eighth Amendment considerations prevent the state from creating an unacceptable risk that "'the death penalty may [have been] meted out arbitrarily or capriciously' or through 'whim or mistake.'" 105 S.Ct. at 2647 (O'Connor, J., concurring) (quoting California v. Ramos, 463 U.S. 992, 999 (1983). Petitions for rehearing were subsequently filed in (W.B.) Tucker and Brooks, and those petitions urged the en banc court to reconsider in light of Caldwell.

Rehearing was denied. However, three members of the en banc court dissented from denial of rehearing in both cases. In identical language in both dissents, the judges stressed that "[t]he majority's use of the Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed. 7d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different)

(Footnote Continued)
DeChristoforo, 416 U.S. 637 (1974), requires reversal of a capital sentence possibly tainted by prosecutorial misconduct. Thus, a Petitioner under Donnelly/Strickland must prove that there is a reasonable probability that "but for those arguments, the death penalty would not have been given." Brooks, 762 F.2d at 1413. The Brooks standard was used to deny relief in Brooks, and the companion cases.

is in direct conflict with the recently decided Supreme Court case of Caldwell v. Mississippi." Brooks v. Kemp, ___ F.2d ___, No. 83-8028 (11th Circuit, July 23, 1985) (Clark, Kravitch, and Johnson, J.J., dissenting from denial of rehearing); (W.B.) Tucker v. Kemp, ___ F.2d ___, No. 83-8137 (11th Circuit July 23, 1985) (Clark, Kravitch, and Johnson, J.J., dissenting from denial of rehearing).

On August 6, 1985, the conflict grew. In Bowen v. Kemp, ___ F.2d ___, No. 84-8327 (11th Cir. 1985), a panel of the Eleventh Circuit again split on the Caldwell/Brooks issues. The two judge majority discussed a prosecutorial misconduct issue in pure Brooks/ Strickland language, without even acknowledging the existence of this Court's Caldwell decision. The dissent applied Caldwell: "Because the recent Supreme Court decision rejects the 'prejudice' test adopted in Brooks, I dissent. . . ." Bowen v. Kemp, No. 84-0327 (11th Cir. August 6, 1985) (Johnson, J., dissenting).

The Eleventh Circuit decided Mr. Darden's case July 23, 1985. The majority opinion addressed only the Witherspoon/Witt issue. The 1983 panel 2-1 decision, which did address the prosecutorial argument issue, is thus the Eleventh Circuit's only opinion on the prejudicial argument in Mr. Darden's case, and how prejudice is to be analyzed. 699 F.2d 1031. In light of the substantial judicial activity in this Court (Caldwell, Strickland) and in the Eleventh Circuit (Brooks) with regard to the proper prejudice standard, Petitioner requested rehearing on the closing argument issue, which was denied. Darden v. Wainwright, ___ F.2d ___, No. 81-5590 (11th Cir. August 27, 1985). In dissent, Judge Clark noted that "it would seem that the evidence here is weaker than in any of the four cases recently decided by the en banc court. The argument is as egregious as any." Id. Rehearing was required by Judge Clark "to clarify the discrepancy between the language of the en banc court in Brooks and that of the Supreme Court in Caldwell. Using

either [prejudice standard], however, Darden is entitled to relief."

The instant tension is between Caldwell and Brooks, but even before the Caldwell decision, the courts that addressed Petitioner's claim split over the issue of prejudice from the closing argument herein. It is apparent that the majority of the Eleventh Circuit judges do not believe that Caldwell provided an Eighth Amendment parameter to the Donnelly due process analysis. If the Eleventh Circuit is correct, certiorari is appropriate in this case to effect such a change in Donnelly now. If the Eleventh Circuit is incorrect, Petitioner is entitled to the benefits of Caldwell, and certiorari is the appropriate vehicle.

Either way, the problem of Caldwell's and Donnelly's scope will be a recurring one until resolved by this Court. Guidance is needed, and this case provides the proper vehicle. Rule 17.1 (c).

4. Respondent's Contentions Speak for Certiorari Rather than Against Certiorari, and Misrepresent the Record and this Court's Precedent.

Respondent admits that there is a "current struggle with the [closing argument] issue by the Eleventh Circuit Court of Appeals and the decision in Caldwell. . . ." Extraordinary Motion, p. 3. However, Respondent believes that the struggle is all for naught because Caldwell "is not a closing argument case; it is a capital sentencing case involving the Eighth Amendment." Id. (emphasis in original). Respondent continues: "Although the Eighth Amendment ramifications were established and developed by virtue of a statement made during a prosecutor's closing argument, the case has nothing to do with establishing any new standard of reviewing allegedly inflammatory and prejudicial remarks made during the guilt phase of a capital trial." Id.

These interesting propositions, if true, indicate that certiorari was providently granted. The State is insisting that outrageous arguments at guilt/innocence are insulated from Caldwell, even if sentencing deliberation occurs without any

significant interruption after the arguments, and even when all acknowledge that the guilt/innocence argument was the sentencing argument. If Caldwell is in fact "not a closing argument case" and has not modified Donnelly, this case is an appropriate case through which to remove the acknowledged "turmoil." Rule 17.1 (c). If Donnelly has been modified, Petitioner should receive its benefit. Id.

Respondent next incorrectly characterizes the effect of Maggio v. Williams, ___ U.S. ___, 104 S.Ct. 311 (1983) on the issues at hand. Respondent intimates that Williams was resolved against that Petitioner because there was not objection to the argument. That proposition is false. Williams was a successor petition, not a first writ case, and the Court rejected habeas relief on the closing argument claim because the failure to "raise this claim in his first federal habeas proceeding is inexcusable. . . ." 104 S.Ct. at 313.[13] Justice Stevens, concurring in Williams, also could not "find an adequate justification for petitioner's failure to raise this argument in his earlier federal habeas action." Id. at 316. Respondent literally underlines that counsel failed to object in Williams, but that was not the basis of this Court's decision. Respondent continues to argue that there was no objection in the case sub judice, and that relief should be denied, despite the flat out rejection of this posited basis for decision: the courts below have resolved the issue on the merits.

Finally, Respondent asserts that Petitioner has, at the last minute, switched from a fair trial guilt/innocence claim to an Eighth Amendment/sentencing claim, arguing that "remarks never held to be constitutionally improper somehow spilled over into the sentencing proceedings." (Extraordinary Motion, p. 5). This

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[13] The Court did note that the district court had determined that the argument was not reversible error, and gave the claim full consideration.

misrepresents the record. In the En Banc Brief of Amicus Curiae filed in the Eleventh Circuit in May, 1983, the issue of sentencing prejudice was clearly advanced: "the prosecution's misconduct cannot be said to have been without influence in this second stage of the proceedings." See Brief of Amicus Curiae, at 37. The sentencing issue had earlier been before the panel, as the dissent specifically stated that "because the prejudicial argument of counsel had an impact upon the jury which was not harmless beyond a reasonable doubt and did affect their deliberations with respect to the death penalty, I dissent." 699 F.2d at 1041. See also Petition for Rehearing and Rehearing en banc, p. 4, filed March 10, 1983; Initial Brief of Appellant to the Eleventh Circuit, p. 18, filed January 14, 1982; Brief of Petitioner to the District Court, filed November 7, 1979; Petition for Rehearing, filed with the En Banc court, filed August 23, 1985. This claim is not new; the controlling law is. Full briefing and argument is merited.

B. THE DECISION BELOW INCORRECTLY APPLIED WAINWRIGHT V. WITT, AND IS IN CONFLICT WITH WITHERSPOON V. ILLINOIS

The Court remanded this case for further consideration in light of Wainwright v. Witt, 105 S.Ct. 844 (1985). There was no indication in the remand that Witt required reversal of the Eleventh Circuit's 7-5 en banc decision in Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984). The en banc court on remand conlcuded that "Witt controls the juror exclusion issue in this case. Under the Witt standards, Darden is not entitled to habeas corpus relief." Darden v. Wainwright, No. 81-5590 slip op. at 1 (July 23, 1985) (en banc). Either the en banc court misapplied Witt, or Witt completely overruled Witherspoon. In either event, this case is now a proper vehicle whereby the Court should clarify the Witt mandate. Rule 17.1 (c).

The Court reaffirmed Witherspoon in Witt, but narrowed the spectrum of challengeable jurors by dismissing as dictum footnotes 19 and 21 from Witherspoon, and denoting Adams v.

Texas, 448 U.S. 38 (1980) as the talisman in a Witherspoon challenge setting: "The standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 105 S.Ct. at 852 (quoting Adams). "[T]he essential balance struck by the Witherspoon decision" was not overruled; it was adhered to. Id., n. 5. The test for exclusion was simply clarified.

Witherspoon and Witt acknowledge that there are people who have scruples against the death penalty who cannot be constitutionally excluded from capital jury service. The more adamantly someone is opposed to capital punishment, the more likely it is that that person's exclusion will be upheld; the less adamant one is in opposition, the more likely it is that their exclusion will be error. There exists a continuum or spectrum of potential jurors who oppose capital punishment, and some can be excluded from service.

The Eleventh Circuit decision says otherwise: persons opposed to capital punishment cannot serve on capital juries. There is no latitude. Juror Murphy was excluded from juror service upon the following:

> Do you have any moral . . . religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?
>
> Mr. Murphy: Yes, I have.

No other questions were asked. It was not established that Juror Murphy would not perform his duties, or that it would even be difficult for him to do so. It was only established that he opposed capital punishment, and it would violate his principles to vote for it.

The en banc court thus believed that Witt required excusal for all opponents of capital punishment, a pre-Witherspoon rule. No finding that the principles would "prevent or substantially impair the performance of his duties" is necessary, in complete

derogation of Witt. Opposition to capital punishment terminates jury service, as the en banc court's decision is explained and defended by Respondent:

> Does not the doing of an act which violates very strong moral, religious, or conscientious principles perfectly represent the "prevention or impairment" of a juror's duties in accordance with his instructions or oath? Though rhetorically posed, the answer to this question is unqualified "yes."

(Extraordinary Motion, p. 6). Respondent's position reveals precisely why certiorari was not improvidently granted.

If a principle against capital punishment automatically means substantial impairment of the ability to perform a juror's duties, Witherspoon has been overruled. Certiorari review here is then proper for the Court to inform the courts that Witherspoon is no longer law, and its "essential balance" is now completely weighted by jurors "uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. 510 at 512. If Witt means that opponents of capital punishment can serve, if their principles will not substantially impair the performance of their duties, certiorari was providently granted to explicate Witt, and afford Petitioner relief. Rule 17.1 (c).

C. PETITIONER'S COUNSEL CONDUCTED NO INDEPENDENT INVESTIGATION FOR SENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

This claim presents a clear-cut question for resolution by the Court: when counsel conducts no investigation to discover and produce non-statutory evidence in mitigation, and the failure to investigate is caused by reliance on a capital sentencing statute which limits evidence in mitigation to certain statutorally defined mitigating circumstances, is Petitioner denied effective assistance of counsel under the Sixth Amendment, and/or a reliable and individualized capital sentencing determination under the Eighth Amendment? This case is a proper vehicle for resolution of this fundamental capital sentencing issue. Rule 17.1 (c).

The defense attorneys in this case candidly and openly admitted at the habeas hearing in 1979 that they considered themselves limited in the types of evidence that could be introduced at sentencing in 1974.[14] The testimony below was

---

[14] Respondent completely ducks this issue, and takes Petitioner to task for predicating this claim on "completely false information," with which Petitioner "has attempted to continuously mislead the courts." Extraordinary Motion, pp.6-7. Respondent states that it is time to "set the record straight."

Petitioner alleged in his petition that he was represented by Mr. Maloney and Mr. Goodwill at trial and at sentencing. The record amply reflects this. (Question of Mr. Maloney: "And you were co-counsel then with . . . Goodwill?" Answer: "Yes, sir." (H.C. 140)). Respondent contends that "Mr. Maloney was nothing more than a legal intern with the Public Defenders' office in 1974 and was assigned to assist Mr. Goodwill." Extraordinary Motion, p.6. While Mr. Maloney was indeed merely an intern early on in the case, Respondent knows, since Respondent cross-examined Mr. Maloney, that that role changed -- Mr. Maloney was an attorney in 1974, not an intern:

> Q. At the beginning of the incident involving Mr. Darden, you were but a legal intern working for the Public Defenders' office?
> A. Yes, sir.
> Q. And I believe you stated that your primary, if not your sole duty, was to assist trial lawyers.
> A. Yes, sir.
> Q. Would it be fair to say that that assistance was in whatever form necessary?
> A. Yes, sir.
> Q. After you passed the bar and became involved in the Darden case on a basis other than as an intern, would you please again describe precisely your involvement in this case and your familiarity with the case--with regard to Mr. Goodwill.
> A. I was the research assistant, so that I was in charge of doing legal research on any motion that had to be done.
>
> I was also, I suppose, not in charge, but it was my duty to complete and familiarize myself with the discovery and completely familiarize myself with potential defense witnesses.
>
> I was assigned the responsibility of preparing and arguing the motion to strike in-court identification.
> Q. Did you familiarize yourself with all discovery, all witnesses, and with all aspects of the case?
> A. Yes, sir.
> Q. Would it be fair to say that you knew about as much -- did you know as much about the case as did Mr. Goodwill?
> A. Yes.

(H.C. 162-63). This was Respondent's cross-examination, the same Respondent who contends that Mr. Maloney was an "intern" during trial. (Footnote Continued)

unequivocal: in preparation for sentencing, the attorneys decided to offer no evidence in mitigation -- "that decision was made after a perusal of the mitigating circumstances in the Florida Statute 921.141. And we reached the conclusion that Mr. Darden did not qualify for any of the mitigating circumstances." (H.C. 154). Mr. Maloney (County Court Judge Maloney, at the time of this hearing), further explained the "perusal":

> We were operating on the premise at that time we were limited to those mitigating circumstances. At least I was completely unaware that any mitigating circumstance, if relevant, is admissable.
>
> Something should have been offered in mitigation. In any captial case such as this, something can be offered in mitigation.
>
> Q. Would it be fair to say that you and co-counsel were using 921.141-- I believe its subsection b, mitigating circumstances-- as being a closed shop? That was all you could consider in way of mitigating circumstances and nothing outside the four corners of the statute?
>
> A. Until the Supreme Court ruled in Gardner v. Florida, that was my opinion. And Gardner v. Florida considerably post-dated this trial.
>
> Q. Okay. But that was what you were all thinking on that day--
>
> A. Yes, sir.
>
> Q. -- on January 19th, 1974.
>
> A. Yes, sir.

(Footnote Continued)

This "intern" or "helper" conducted most of the voir dire (R. 104, 107, 116-52, 159, 160-76, 179-82), cross-examined the victim's widow out of the presence of the jury to support his argument that an identification should be stricken (R. 214-24), cross-examined five other witnesses (R. 296-304, 3318-29, 333-42, 407-08, 417-22), and conducted the first closing argument for the defense (R. 716-38). He did all this as a "helper," and "[p]rior to trial was never informed that [he] would do any actual work before the jury." (H.C. 145). He did not know he was to conduct voir dire until the day of trial (H.C. 145-47), he did not know that he was to cross-examine a witness until the witness was on the stand (H.C. 148), and he was left completely alone to deal with the case when "lead" counsel Goodwill was too drunk/hung-over to attend. (h.C. 159).

From this activity, Petitioner could reasonably describe Mr. Maloney as being at least one of his attorneys at trial.

. . .

> A. We certainly went through the mitigating circumstances in 921.141, and I believe we came to the conclusion that there were no mitigating circumstances and no evidence was presented.

(H.C. 154-55). Maloney learned he was wrong after Lockett: "Lockett is the first time that I found out from the United States Supreme Court that mitigating circumstances were not limited to the enumerated mitigating circumstances." (H.C. 178).

Co-counsel Mr. Goodwill felt similarly limited (H.C. 337),[15] as did the chief public defender, who testified below, but who did not participate at trial. The following colloquoy occurred between the Magistrate below and the chief public defender:

> Q. And in connection with the penalty phase, was Mr. Darden consulted or advised or prepared for his testimony at the penalty phase?
>
> A. I think he was, your honor.
>
> Q. To your knowledge, was he or wasn't he?
>
> A. Yes, because we had discussed it. We had taken the statute and gone down its specific grounds for mitigating circumstances, and we could find no grounds, as you know what the six were.

(H.C. 245-46).

Consequently,

> In the sentencing portion of the trial, there were practically no mitigating circumstances brought forth at all. Mr. Darden was allowed to testify and did testify, did speak to the jury, made his own presentation to the jury.

Respondent contends that since Mr. Goodwill knew of no non-statutory mitigating evidence, and Mr. Goodwill told Petitioner

---

[15] In the haste brought about by the rush of execution, counsel for Petitioner did commit scrivenor's errors, for which he apologizes. He referred to co-counsel as "McDonald" and "McDaniel" and said that Goodwill had never tried a capital case. Petitioner intended to indicate that Mr. Goodwill had tried no capital cases post-Furman, but erred.

The error does not affect the validity of the claim: Mr. Goodwill may have tried thousands of cases pre-Furman, but he still felt bound by the statute, and "investigated" accordingly: not at all.

"he could take the stand an tell the jury anything at all in mitigation," there was no constitutional violation, despite the lack of investigation. (Extraordinary Motion, p. 7). Goodwill knew of no evidence because he did no investigation. Allowing a defendant to testify to mitigation does not provide him with the opportunity to proffer any aspect of his background which may be mitigating. It merely forces a client to sacrifice his fifth amendment right in order to partially effect his Eighth Amendment rights. Even upon such an election to testify, the defendant's testimony is no substitute for the myriad mitigating circumstances which an investigation would reveal.

The Court has recognized that the capital sentencing scheme in effect in Florida in 1974 apparently restricted the introduction of non-statutory mitigating circumstances. Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340, 347n.4 (1984). See also Barclay v. Florida, 467 U.S. ___, 103 S.Ct. 3418, 3430n.2 (1983) (Stevens, J., concurring). Trial counsel here was under such an impression. The issue for resolution is whether this restriction on or by counsel is of constutional moment.

It is clear that there can be no restriction, either expressly by statute, Lockett v. Ohio, 438 U.S. 586 (1978), or as applied in a particular case, Eddings v. Oklahoma, 455 U.S. 104 (1982), upon the consideration of mitigating factors by judge or jury. The Eighth Amendment requires individualized sentencing, Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2743-44 (1983), and restriction on mitigation "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S. at 605. Proceedings must "remove any legitimate basis for finding ambiguity concerning the [mitigating] factors actually considered. . . ." Eddings, 455 U.S. at 119 (O'Connor, J., concurring), "[i]n order to ensure that the death penalty was not erroneously imposed. . .

." Id. at 119.

Petitioner's ineffective assistance of counsel claim is this: counsel did not prepare for sentencing, and as a result Petitioner was denied meaningful individualized consideration. Whether this was through counsel's neglect, Strickland v. Washington, 104 S.Ct. 2052 (1984), or because the State, through its statute, prevented such preparation, United States v. Cronic, 104 S.Ct. 2039 (1984), a reversal of Petitioner's sentence is required.

"[I]f counsel entirely fails to subject the prosecutor's cas to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Cronic, 104 S.Ct. at 2047. Almost sleeping counsel is no counsel at all. There was no adversarial sentencing hearing. There was no hearing at all, because counsel believed the sentencing statute did not allow one.

Similarly, if counsel's failings are assignable to the State, no prejudice need by shown. When the surrounding circumstances "make it so unlikely that any lawyer could provide effective assistance," then ineffectiveness is "presumed without inquiry into actual performance at trial." Id. at 2048. A statute that a lawyer reasonably believes to restrict mitigation, in an Eighth Amendment setting, produces surrounding circumstances making it impossible to perform as an advocate: advocacy requires investigating and producing mitigating circumstances, and the statute prevented it.

This case provides an opportunity to determine whether it is in fact ineffective per se for trial counsel in a capital case to not investigate to discover mitigating circumstances. If the statute makes an attorney's decision to forego investigation "reasonable," a pure Eighth Amendment violation arises, and no prejudice need by shown. The Eleventh Circuit en banc decisions in Songer v. Wainwright, No. 83-3064 (August 16, 1985) and Hitchcock v. Wainwright, No. 83-3578 (August 28, 1985), highlight

the legitimacy of this claim. In Songer, the trial judge, "misinterpreted" the Florida statute "as limiting consideration of mitigating evidence to those "enumerated items." Songer, slip op. at 2. The en banc majority recognized that the statute could be so construed, and that the trial judge there did so misinterpret the law. The court held that a resentencing hearing was necessary, but left it to the state court to decide whether the resentencing required a jury. Four Judges joined in an opinion concurring in part and dissenting in part. They believed that Florida law produced "counsel's failure to develop or present non-statutory mitigating evidence," and because "state law operated to restrict consideration of evidence by both the sentencing judge and the advisory jury," the jury should be allowed to perform its critical role at resentencing. Songer, opinion of Clark, J., concurring in part and dissenting in part, in which Kravitch, Johnson, and Anderson, J.J., joined.

Hitchcock likewise recognized the confusing status of Florida law at the time of Petitioner's trial, and proposed a framework for resolution of Sixth and Eighth Amendment claims arising from the statute's effects. Petitioner believes that full briefing and argument in this Court can and should properly resolve these issues, of great import to the proper administration of capital sentencing.

CONCLUSION

For the reasons stated above, Respondent's Extraordinary Motion to Dissolve Stay of Execution and Suggestion That Writ Was Improvidently Granted should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard W. Prospect, Assistant Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida, 32014, on this 07 day of ~~September~~ October, 1985.

ATTORNEY

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED

1. Did the prosecution's calculated, unprofessional and inflamatory closing argument rob the determination of petitioner's guilt of the fundamental fairness required by due process and deprive the determination of his sentence of the reliability required by the eighth amendment?

2. Whether the exclusion for cause of a potential juror solely on the basis of his scruples against capital punishment can be reconciled with the decision of the Court in *Wainwright* v. *Witt*, 469 U.S. ____, 83 L.Ed.2d 841 (1985)?

3. Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his trial, depriving him of a full, fair, and individualized determination of whether he should live or die?

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2241.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution of the United States, which provides in relevant part: "In all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense"; the eighth amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"; and the fourteenth amendment, which provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A. The Crime And The Evidence At Trial

Carl's Furniture Store in Lakeland, Florida, was held up early in the evening of September 8, 1973. One of its owners,

Carl Turman, was shot and killed as he entered through a back door. Phillip Arnold, a sixteen-year-old who lived nearby, was shot and wounded as he sought to give aid to Mr. Turman. The gunman also attempted a sexual assault on Mrs. Turman.

Just a few moments after these events, Willie Jasper Darden, a black man, lost control of his car and struck a telephone pole a little over three miles from the furniture store. At the time, he was on weekend furlough from a Florida prison and was returning to his girlfriend's house in Tampa. A few hours later, Mr. Darden was arrested at the home of his girlfriend for leaving the scene of an accident. Later the same night, he was charged with the murder of Mr. Turman, the attempted murder of Mr. Arnold, and the robbery that accompanied these shootings. R.586.[1]

The state's case rested primarily on identifications of their black assailant by the white victims, Mrs. Turman and Mr. Arnold, and limited forensic evidence. The latter consisted of testimony by a deputy sheriff that, a day and one-half after the crime, he found a .38 caliber pistol in a ditch under four inches of water thirty-nine feet from the highway and about an equal distance from the place of petitioner's automobile accident. R. 503-04, 511. It was shown at trial that the pistol was the same caliber as the murder weapon and that four bullets had been fired from it in a sequence that matched the shooting during the crime. The prosecution was unable to connect the pistol to the crime by ballistic or other forensic evidence. R. 357-58, 514, 517-22.

Mr. Darden testified at length. R. 571-659. He told how his automobile had skidded from the highway in wet weather as he hastened back to Tampa from Lakeland to meet his girlfriend and attend a wedding later on that evening. R. 574-76. He explained that, with the aid of a passing motorist, he had

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[1] Citations to the transcript of the trial record are designated as R. ____. Citations to the record on appeal to the Florida Supreme Court are designated as A.R. ____. Citations to the hearing before the federal magistrate on habeas corpus are designated as H.C. ____. Citations to the Joint Appendix are designated as J.A. ____.

sought unsuccessfully to locate a wrecker to take the disabled auto in tow. Failing in this effort, he had obtained a ride to Tampa. This was corroborated by the State's witnesses, who also noted Mr. Darden's calm and poise during this episode. R. 577-579, 330-31, 334-35, 340-41. Mr. Darden denied that he had been at the furniture store or had had anything to do with the crimes with which he was charged. R. 592-93, 598-99.

Mr. Darden's testimony concerning the events of the evening of September 8, 1973, was both plausible and partially corroborated by the state's evidence. Apart from the identification testimony of Mrs. Turman and Mr. Arnold, it was not in direct conflict with the state's evidence. Thus, to a large degree, the state's case rested on the "jury's determination of the credibility of Darden's alibi testimony as against the eye-witness testimony of the victims." *Darden* v. *Wainwright*, No. 79-566 Civ. T-H, Slip op. at 22 (M.D. Fla. April 15, 1981) (Magistrate's Recommendation and Report). (J.A. 214).

This eyewitness testimony was not without substantial problems. Immediately after the offense, Mrs. Turman told officers that she could not remember what the subject looked like or what he was wearing. This was, she explained, because she was scared to look while the crime was in progress, and at one point covered her face with her hands so she would not have to see. R. 240, 280. *See also* R. 232, 236. She later described the man as the same height as herself, 5'6", R. 238, heavy-set, very clean-shaven, black, approximately 200 pounds, with a fat face. R. 237, 239. At trial, she was sure the shirt was a pullover, with a stripe around the neck and waist. R. 226-27. Mr. Arnold confirmed part of her identification, remembering a heavy set man wearing a knit shirt of dull, light color with a ring around the neck, R. 443, and that the assailant was clean shaven. R. 476, 498.[2] But he testified that the gunman was almost his height, about 6 feet two inches tall. R. 496-97.

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[2] In fact, in excluding one of the photographs in the photo show-up, described below, Mr. Arnold eliminated one photo *because* the person had a moustache. R. 464.

In contrast to these descriptions, petitioner was five feet, ten or eleven inches tall and weighed approximately 170 to 175 pounds. R. 596. Moreover, one of the state's witnesses — a motorist who had stopped at the scene of the auto accident that, according to the prosecution's theory, occurred when petitioner was fleeing the scene of the crime — testified that petitioner was wearing a white shirt that buttoned down the front and that he had a gray moustache. R. 311, 313, 318-20.

The substantial discrepancies between Mr. Darden's actual appearance and Mrs. Turman's and Mr. Arnold's descriptions of their assailant are not surprising in light of the conditions that surrounded their initial identifications of Mr. Darden. Three days after the incident, two sheriff's deputies visited Mr. Arnold in the hospital, where he was recovering from his bullet wounds. R. 446, 460-61. According to Mr. Arnold's testimony, elicited out of the presence of the jury, he had by this time already read newspaper stories about the crime, R. 457-58, and he probably knew of the arrest of a suspect. R. 462.

The deputies, Mr. Arnold recalled, had shown him six photographs and asked whether he could identify his assailant from among them. R. 446, 459-60. He immediately rejected four out of hand; "they didn't look anything at all like him." R. 449, 461-64. He then wrote on a piece of paper the following information:

> "Both of these two look a little like him!"
>
> DID HE HAVE A MUSTACHE?
>
> "I don't think so!"
>
> WHAT TYPE SHIRT WAS HE WEARING?
>
> "It was short sleeve. It was something like a red or orange and I think it was a knit material, pale."

R. 455, 475. Mr. Arnold then picked out of the two remaining photographs the one that looked "a little like him." This picture bore the name "Darden" and the date of arrest, "9-9-73."

The circumstances surrounding Mrs. Turman's identification were as follows. The day following her husband's funeral,

she was asked by the prosecutor to attend Mr. Darden's preliminary hearing. She was taken to a tiny courtroom with one black male sitting at defense table and no other blacks in the room. R. 221-22. The prosecutor walked over to Mr. Darden, pointed at him, and asked: "Is this the man that did it?" A.R. 50. She said yes. *Id.* Asked by the court whether she was sure that the man at the defense table was the assailant, she replied that "even with his back to me while I sat [at the rear of the courtroom] I reached over and touched my sister's hand and said, 'That's him.' " A.R. 53.

The only physical characteristic which every witness who saw both men could agree on was race: they were both "colored." The testimony of Officer Neill, who arrested Mr. Darden in Tampa, is particularly telling. Neill was asked if the man he arrested, Mr. Darden, fit the physical description given by Mrs. Turman. Neill replied: "Yes. The dark-colored automobile, the time element, the car crash . . . just lead me to believe this possibly was him." Pretrial hearing of 1/9/73 at 82. This "physical description" would have fit almost any black man near the scene of the crime that day. Indeed, the reliance on race as substantiating the identifications was something the prosecutor would return to in his summation.

B. Exclusion Of Death-Scrupled Jurors

At voir dire, several jurors with scruples against the death penalty were excluded for cause upon the motion of the prosecutor. One of those excluded was potential juror Murphy. He was excluded solely upon the following question and answer:

> THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?
>
> MR. MURPHY: Yes, I have. (J.A. 9).

R. 165. This was the only question asked Mr. Murphy.

C. The Interjection Of Race At The Voir Dire

During the voir dire, the prosecutor addressed the potential jurors as follows:

> The testimony is going to show I think very shortly when the trial starts the victims in this case were white and, of course, Mr. Darden, the defendant, is black. *Can each of you tell me that you can try Mr. Darden as if he was white?* Can you look at this defendant and assure me that you can try him as if he is white? Because the victims will be white. Can you look at the defendant and even though he is black, can you try him as if he was white?

R. 57, 115 (emphasis added). (J.A. 8-9).

Apart from the effect of reenforcing for the jury the different racial status of the defendant and the victims, the question presupposes disparate treatment for blacks and suggests that it requires a particular effort to treat a black defendant within the same standards of due process and impartiality due a white person. Even this would not be so disturbing had the prosecutor stopped there. But, as we shall see, his closing argument served forcefully to underline the negative implications of this voir dire questioning.

D. The Closing Arguments

Petitioner's counsel opened and closed the arguments prior to deliberation on guilt or innocence. Mr. Maloney, the less experienced of the two,[3] began. He conceded that the perpetrator of the murder and assaults was "a vicious animal." R. 717. He also expressed his personal opinion regarding the strength of the circumstantial evidence regarding the pistol: "It's not good enough for me. I wouldn't do what you're being asked to do on that, really I wouldn't. . . ." R. 734. Finally, he expressed his personal opinion regarding the state's failure to prove guilt beyond a reasonable doubt, R. 736, and concluded: "The question is, do they have enough evidence to kill that

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[3] At the time, Mr. Maloney had been licensed as an attorney for only four months.

man, enough evidence? And I honestly do not think they do." R. 737-38.

Apart from these isolated errors committed by a fledgling lawyer, the defense summation was unexceptionable. Mr. Maloney recounted the state's evidence, stressed the virtual absence of any forensic evidence tying to the crime either Mr. Darden, his car, or even the weapon found a day and one-half later near the site of the wreck. He stressed the lack of any evidence tying the gun, despite its unique marking[4] and non-standard characteristics[5] to Mr. Darden. Finally, he noted the discrepancies between the descriptions of the assailant given by Mrs. Turman and Mr. Arnold, on one hand, and that given by the passer-by who assisted Mr. Darden after the wreck: The victims agreed that their assailant was clean-shaven and wore a dark or dull-colored pullover with a band or ring at the neck; the passer-by described Mr. Darden as having a moustache and wearing a white shirt with buttons down the front.

The prosecution's argument was split between Mr. White and Mr. McDaniel. Mr. White argued first, marshalling the state's evidence, enumerating the elements of the offenses, and discussing the reliability of the identifications. R. 738-747. He concluded:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murder, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

R. 748. (J.A. 15).

At that point, the senior prosecutor, Mr. McDaniel, rose to complete the summation. It is only possible to understand the nature and effect of that argument by viewing it as a whole, rather than a disaggregated series of individually improper

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[4] The gun was marked "United States Property, Massachusetts, December 29, .38 special BRD." R. 809.

[5] The gun had been rebored. *See* R. 778.

comments. Following on the heels of trial and arguments focusing on the reliability of the eyewitness identifications in the light of the weakness of the balance of the prosecution's case, McDaniel's argument was carefully crafted to make up for any deficiencies in the state's proof by distracting the jury from the evidence. From start to finish, McDaniel interjected and emphasized the emotional, the irrelevant, and the impermissible.

First, he disclaimed emotional involvement in the case. R. 749. (J.A. 15). Then he took credit for the tactical choice of defense counsel in focusing on the failures of the Polk County Sheriff in investigating the case: "he has notes I gave him many years ago." *Id.* Having thus established his authority and credibility, he launched on his first theme:

> But let me tell you something. As far as I am concerned, there should be another defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned . . . this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?
>
> * * *
>
> He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash. . . .
>
> No, I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy [Phillip Arnold].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family . . . that turns out his family is a girl friend in Tampa, . . . his sponsor.

R. 749-51. (J.A. 15-16).

Having sounded his theme—"Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it." R. 752—(J.A. 17). McDaniel turned to his main point.

> The Court will tell you at the end of the argument in the jury instructions at this point, you are merely to determine his innocence or guilt, nothing else whether he is guilty or innocent. And after you return that verdict of guilty of first degree murder . . . then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.
>
> That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that. But . . . I will guarantee you I will ask for the death. There is no question about it.
>
> The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend.

R. 752-54. (J.A. 17-18).

McDaniel then sounded his second theme:

> Mr. Maloney said, well, sure he had an accident, . . . b' do you think he would admit that accident if he wouldn't have had that fancy fingerprint [6] to prove it? No, he wouldn't have admitted nothing.

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[6] There was no fingerprint evidence introduced in this case, whatsoever.

> I don't know, he [Darden] said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.

R. 754. (J.A. 18).

McDaniel turned briefly to the reliability of the eyewitness testimony. R. 756-57. (J.A. 18-19). He then focused on the events of the crime, R. 757, which he punctuated with the following observations:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [Darden] sitting here with no face, blown away by a shotgun, but he didn't. . . . I wish someone had walked in the back door and blown his head off at that point. But he is lucky, the public unlucky, people are unlucky, it didn't happen.

R. 758-59. (J.A. 20).

> But he [Darden] heard every word everybody said, and I assure you, if we hadn't been able to prove the accident, they would never have admitted it.

R. 764. (J.A. 23).

> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections.

R. 764-65. (J.A. 23).

> But sometimes, it emotionally gets to me. For four days I saw that man sitting there—calm, cool, calculating, smiling at the right time, until it came up time for his parole was in question, and then he goes to the stand with his handkerchief in his hand. . . .
>
> I don't cry for him. . . .

R. 765. (J.A. 23).

> He's even got a driver's license. Why in the world does—what in the world is a State prisoner doing with driver's license? I wonder if the public is paying for it.

R. 766. (J.A. 24).

> Lie detector test. That's the red herring they would like to throw in. I don't believe anything he says. . . .

R. 769-70. (J.A. 26).

McDaniel returned to the evidence, discussing the accident and eyewitness testimony again. R. 770-75. He then discussed the gun and the shooting, noting that four shots were fired. R. 773-75. "And Mr. Darden saved one. Again, I wish he had used it on himself." R. 775. (J.A. 28). Of the accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." R. 775. (J.A. 29).

McDaniel's peroration did not let up.

> He stopped at one service station, he says, to get a wrecker in Plant City. That's what he says, I don't know that he stopped at any. What was he going to do with the wrecker when he got it? I guarantee you he was not going back to the scene of the accident until he had gotten home.

R. 777-78. (J.A. 30).

> [D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.

R. 779. (J.A. 31).

And then he closed:

> I'm going to ask you, in closing, that you consider the direct evidence, and as Mr. Maloney said, its good evidence, the best evidence, the direct evidence, the eyewitness considered as circumstantial evidence, surrounding that wreck, the time, the place, *his color*, clothes, the gun, where he went, leaving the scene of an accident and don't turn this man loose. I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you (emphasis added).

R. 780-81. (J.A. 32).

There were two objections during the course of McDaniel's summation. The first occurred immediately after McDaniel

referred to the defendant as "a criminal" and alleged that he had carried a gun when he returned home on furlough. R. 751. This was objected to as not based on the evidence. The judge merely deflected the issue, reminding the jury that they "are the judges of the evidence." *Id.* (J.A. 16-17).

The second occurred later in the argument, "that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself." R. 779. This degenerated into an exchange between Mr. Maloney and Mr. McDaniel about which side had less evidence. R. 779-80. The court's response was to overrule the objection and order counsel to proceed. R. 780. (J.A. 31).

The judge's instructions to the jury prior to the summations tended to make matters worse. He told the jurors that:

> I am sure that none of the attorneys would intentionally misquote any evidence or mislead you in any way. They are all respected attorneys back in Polk County; they are all personal friends, I think, of mine; and I know each of them well. . . . [T]hey are permitted to argue the law to you. They are certainly permitted to argue the facts to you; so both will be involved. But they are not binding upon you.
>
> Now, let me tell you what they are. They are a big help to you, or can be. These are men who are trained in the law or trained in trials, and their analysis of the testimony, their analysis of the issues, their comments upon the pertinence and the weight of the particular items of testimony can be extremely helpful to you. . . .

R. 713-14.

Faced with this, Mr. Darden's senior counsel, Mr. Goodwill, did the best he could to respond. Referring to White's and McDaniel's improper arguments, he noted particularly and "more importantly, the way they were said, the manner in which they were expressed . . . ," R. 782, "the yelling and screaming and righteous indignation and get up and blow your face off," R. 801; "the yelling and screaming and the pushing and the shoving and the hitting with the stick, and the whole works." R. 802. And he admonished the jury: "He tries to win

you or embarass you into a decision based on his argument, but not based on what came from that stand. . . ." *Id. See also* R. 786, 787, 791, 794, and 804. Instead, he discussed the evidence and testimony at great length, R. 782-820, concluding: "You can't prove him guilty on what Mr. McDaniel says, and by the same token, you can't find him innocent on what I say." R. 818.

E. The Performance Of Defense Counsel At Sentencing

The senior of the two assistant public defenders to represent petitioner, Raymond A. Goodwill, Esq., served as a public defender only part-time, two days per week. H.C. 273. Although he had tried three or four capital cases, H.C. 278-79, he had no experience in preparing a case for the separate, post-verdict sentencing trial provided by Florida's 1972 death sentencing statute. Co-counsel, Maloney, was just recently licensed to practice. *See* H.C. 132, 143. (J.A. 153). Ironically, the responsibilities of lead counsel fell largely upon him. (J.A. 154-189).

Counsel's preparation for the sentencing hearing consisted solely of "twenty or twenty-five minutes" of talking with the victim's widow during a "thirty or forty minute recess" between the announcement of the guilt verdict and the commencement of the sentencing proceeding. H.C. 373. Counsel waived opening argument to the jury, R. 893, offered no evidence, R. 892, and made only a brief, three or four-minute summation. R. 895-97. Maloney, the less experienced counsel did the summation; he began by telling the jury that he was "sure that you will find that Mr. Darden falls into just about every one of the *aggravating* circumstances. . . ." R. 895 (emphasis added).

Once counsel had completed this "presentation," the court, in the presence of the jury, invited Mr. Darden to speak. Speaking from the counsel table, Mr. Darden said:

> Ladies and gentlemen of the Jury, I was on the stand yesterday for some period of time giving my testimony[,] the best of my knowledge of what happened on that Saturday. I stand firm before you again today after being con-

> victed, that what I told you on that stand was the truth. You have found an innocent man guilty of murder, something I has no knowledge about. You not only damaged me, you damaged my family, seven kids and a wife. That's all, Your Honor.

R. 897-98. The jury returned a recommendation of death, but only by a divided vote. *See Darden* v. *Wainwright*, 699 F.2d 1031, 1041 (11th Cir. 1983) (Clark, C.J. dissenting). (J.A. 269). The trial court imposed the death sentence, finding only two mitigating circumstances: that petitioner "is the father of seven children" and that he "repeatedly professed his complete innocence of the charge." A.R. 208. (J.A. 35).

Defense counsel knew at trial of information relevant to Mr. Darden's character and background. H.C. 885. For example, counsel received psychiatric and psychological evaluations containing mitigating material. The psychiatric report stated that petitioner

> could be called a [Schizoid-] personality, a man who has been socio- and economically deprived throughout his life. He had never known as a child, any mothering, as his Mother died at an early age and he was cared for by whatever relatives were available.

A.R. 27. A second psychiatric report contained a fuller treatment of the circumstances of Mr. Darden's life from childhood. It indicated that he ran several businesses successfully, was well liked in the community, and was considered non-violent by his acquaintances. His intellectual functioning was evaluated as dull normal, with an I.Q. of 88. Report to Judge Dewell from H. Goldsmith, Ph.D. (January 14, 1974); *see* A.R. 151. In addition, petitioner's girlfriend would have testified that he was good, kind, and non-violent to her and others.

Preparation by counsel would have yielded more.[7] Mr. Darden was born in Greene County, North Carolina in 1933. His mother, the daughter of tenant farmers, was fifteen-years-old.

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[7] The information that follows is contained in the record of petitioner's second habeas corpus proceeding which is before the Court.

His father was an auto mechanic with a third grade education. His mother died in childbirth, two years later, along with his infant brother. Both of his parents, like most black residents of that area were but two generations removed from slavery.

Greene County is an impoverished rural area of Eastern North Carolina with a 50% black population. It is primarily an agricultural community; tobacco is the basis of the local economy. When Mr. Darden was born, the local tobacco farmers still depended exclusively on the labor of their black tenants. These blacks were free only of the legal status of slavery; their lives were entirely dependent on the marginal existence available through seasonal labor in the tobacco fields. More than 70% of the farms in the county were worked by black tenants (affidavit of William C. Harris) yet by the 1930's, blacks owned only 4% of the taxable wealth in the state. The average black family earned less than $1,000 annually. The schools available to blacks held classes only during those brief respites from the seasonal tobacco industry. The high-school graduation rate for blacks during that period was four times less than that for whites. The average formal education for black adults in rural areas like Greene County was 2½ years. The infant mortality rate in Wilson, North Carolina, the closest city to the rural area in which Mr. Darden was raised, was 136 per 1,000, fourth highest of any city in the United States. The rate among the black population was twice that of the white population.

As recounted by historian William C. Harris, the black residents of Greene County were "commonly referred too as 'niggers.' When they were brought to court, they usually found themselves at the mercy of a hostile or indifferent white judge and jury . . . black offenders were more severely penalized than the crimes warranted. . . . Most of their crimes were minor theft, frequently committed in order to survive." Mr. Darden's earlier experience with the criminal justice system consisted of a series of economic crimes committed in an attempt to support himself and his family in an environment totally lacking in economic opportunity for the average black. One early episode resulted in a four year prison sentence for

forging a check for forty-eight dollars in order to buy food for his pregnant wife and himself.

Life in Greene County was an ordeal for blacks from which few escaped unscathed. "Willie, along with his contemporaries born in the 1930's, faced a life of marginal existence in which there was little work for much of the year, no hope that he could improve his social standing, and almost non-existent opportunity to acquire a high school education and advance into a career." (Harris affidavit).

Mr. Darden's early life was spent in several different homes. After his mother died when he was two, he was sent to live with his maternal grandparents. He returned home when his father remarried in 1938, but he was sent to a foster home when his stepmother abandoned the family. These tenant farmers prevented him from attending school, made him perform excessive farm chores, and failed to provide him clothing. He eventually stole in order to dress properly.

After several months with the foster family, Willie Darden was involved in several episodes of petty theivery. He was eventually caught attempting to pilfer a mailbox, for which he was sent to the National School for Boys at the age of sixteen. Once there, he adamantly refused to return to this foster family.

The authorities at the School for Boys described him at the time as a simple, well-intentioned and cooperative youth who seemed inordinately obsessed with his father and extremely concerned that he had not heard from him since he was abandoned to the foster home. An evaluation conducted at the time states that Willie was very "anxious to reestablish the relationship . . . between himself and his father," and that he constantly "describes his father in glowing terms and actually embroidered on fact when giving his history in order to present the father in the most favorable light." It is clear that the unexplained abandonment by his father crushed Willie emotionally and was a radical turning point in his transition from adolescence to adulthood.

Those who knew Willie Darden describe him as a kind, wise, and non-violent man, and express a unanimous disbelief that he could be capable of committing the crime with which he was charged. His former wife recalls him as a good man who never argued or fought with anyone. His son remembers their loving relationship and describes him as "the most amazing and inspirational man I have ever met."

Counsel were aware of none of this. The reason is clear: They believed they "were fairly limited statutorily by what things were in the statutes as far as mitigation." H.C. 372. As Maloney testified:

> . . . after a perusal of the mitigating circumstances in the Florida Statute 921.141[,] . . . we reached the conclusion that Mr. Darden did not qualify for any of the mitigating circumstances.
>
> We were operating on the premise at that time that we were limited to those mitigating circumstances. At least I was completely unaware that any mitigating circumstance, if relevant, is admissible.
>
> Something should have been offered in mitigation. In any capital case such as this, something can be offered in mitigation.

Q. Would it be fair to say that you and co-counsel were using 921.141—I believe it's subsection B, Mitigating Circumstances—as being a closed shop? That that was all you could consider in the way of mitigating circumstances and nothing outside the four corners of the statute?

A. Until the Supreme Court ruled in *Gardner* v. *Florida*, that was my opinion. And *Gardner* v. *Florida* considerably postdated this trial.

Q. Okay. But that was what you were all thinking on the day—

A. Yes, sir.

Q. —on January 19th, 1974.

A. Yes, sir.

* * * *

A. We certainly went through the mitigating circumstances in 921.141, and I believe we came to the conclusion that there were no mitigating circumstances and no evidence was presented.

H.C. 154-55; (J.A. 162-163) *see also* H.C. 245-46. Maloney later learned he was wrong: "*Lockett* is the first time that I found out from the United States Supreme Court that mitigating circumstances were not limited to the enumerated mitigating circumstances." H.C. 178. (J.A. 177).

II. COURSE OF PROCEEDINGS

The history of this case is tortuous. On direct appeal, the Florida Supreme Court treated the prosecutorial argument issue on the merits.[5] It conceded the argument was improper but nevertheless affirmed because "[t]he law requires a new trial only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt . . . or in which the comment is unfair." *Darden* v. *State*, 329 So.2d 287, 289 (Fla. 1976). It found no unfairness here for three reasons: (1) in light of the defense argument, "the statements of prosecuting counsel . . . do not seem unduly inflammatory . . .," 329 So.2d at 290; (2) in light of the "heinous set of crimes . . ." the arguments were "fair comment . . . reasonably describing what happened and what should be done to the guilty party . . .," *id.* at 290-91; and (3) in light of "overwhelming eyewitness and circumstantial evidence" and "absolutely no mitigating circumstances," the remarks, "were not sufficient to deprive Appellant of a fair trial. . . ." *Id.* at 291. Two justices dissented. (J.A. 44-60).

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[5] The court of appeals concluded that the "suggestion the Florida Supreme Court did not dispose of the issue on the merits is untenable." *Darden*, 699 F.2d at 1034, *aff'g*, 513 F. Supp. at 951-52. (J.A. 272).

In his brief before the Florida Supreme Court (pp. 28-35), Mr. Darden challenged the exclusion for cause of venireman Murphy. The argument was rejected by that court without discussion. *Id.* at 289.

This Court granted certiorari, heard argument, and dismissed the writ as improvidently granted. *Darden* v. *Florida*, *cert granted*, 429 U.S. 917 (1976), *cert. dismissed*, 430 U.S. 704 (1977).[9] On federal habeas corpus, the Magistrate recommended that the writ be granted on the grounds of prosecutorial misconduct. The Magistrate also recommended that relief be granted due to the unconstitutional exclusion for cause of venireman Murphy. (J.A. 190) The district court disagreed on both issues and denied relief. *Darden* v. *Wainwright*, 513 F.Supp. 947 (M.D. Fla. 1981). (J.A. 233) A panel of the Eleventh Circuit affirmed, one judge dissenting. *Darden*, 699 F.2d 1031 (11th Cir. 1983). (J.A. 260). Rehearing en banc was granted, and the district court was affirmed by an equally divided court. *Darden*, 708 F.2d 646 (11th Cir. 1983). (J.A. 295) On second rehearing, the en banc court reversed, granting relief on the *Witherspoon* claim. 725 F.2d 1526 (11th Cir. 1985). (J.A. 299).

This Court vacated and remanded for reconsideration in light of *Wainwright* v. *Witt*, ___ U.S. ___, 83 L.Ed.2d 841 (1985). (J.A. 375) On remand, the en banc court denied relief, two judges dissenting. *Darden*, 767 F.2d 752 (11th Cir. 1985). (J.A. 376).

SUMMARY OF ARGUMENT

The closing arguments made by the prosecutors in this case have been condemned by virtually every judge who has looked at them. They have never been defended by the state as proper. These arguments flouted every rule of professional

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[9] The Court initially granted certiorari upon a petition that included the *Witherspoon* claim, *see Darden* v. *Florida*, 45 U.S.L.W. 3356 (Nov. 9, 1976), but subsequently limited the grant of certiorari to the issue of prejudicial prosecutorial summation. 429 U.S. 1036 (1977). (J.A. 61-62).

conduct recognized by the organized Bar. They were calculated to divert the jury's attention from the central factual issues in the case, especially the issue whether the prosecution's problematic identification evidence was sufficiently persausive to convict Mr. Darden. Crafted to evoke passion and inflame prejudice, these arguments violated Mr. Darden's most basic rights: to a fundamentally fair and reliable determination of his guilt or innocence and of the appropriate sentence.

"The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close scrutiny." *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976). Because the prosecution's improper arguments were designed and likely to affect the reliability of the factfinding process, they introduced more than a probability of actual prejudice. In such a case, the state should be required to demonstrate beyond a reasonable doubt that the arguments were harmless, *Chapman* v. *California*, 386 U.S. 18 (1967),—if it asserts that they were. Here, the state has shown nothing of the sort. To the contrary, it appears only too likely that the prosecutor's arguments achieved the result they plainly sought: to tip the scales in favor of a verdict of guilt. Nor, on this record, can the arguments that strove improperly to emotionalize the determination to impose the death sentence be said to have had no effect. *Caldwell* v. *Mississippi*, 472 U.S. ____, 86 L.Ed.2d 231, 247 (1985). Accordingly, both the conviction and the sentence must be reversed.

Reversal of the death sentence is required on two other grounds: First, prospective juror Murphy was excluded solely on the basis of a single question and answer that disclosed strong scruples against the death penalty. This question, however, failed to inquire—and the answer, therefore, failed to establish—whether those scruples were so strong that they would substantially impair Mr. Murphy's performance as a fair and impartial juror or whether Mr. Murphy would be able to subordinate those scruples to the law. *Wainwright* v. *Witt*, 469 U.S. ____, 83 L.Ed.2d 841 (1985). Because his exclusion for

cause was the result of a purely legal error, reversal is required on the face of the record.

Second, Mr. Darden was deprived of the effective assistance of counsel at the sentencing stage. In effect, he was left to face the jury alone: He made a short statement in mitigation at the urging of the trial judge, but no other mitigating evidence was presented. This was because counsel failed entirely to investigate or prepare for the sentencing hearing until twenty minutes before it began. Had they done so, they could have presented relevant, available information concerning Mr. Darden's background and character. This mitigating information would have counteracted much of the prosecutor's improper and unsupported assertions and arguments. Because of counsel's failure, Mr. Darden's sentencing hearing was less an adversary proceeding than the sacrifice of an unaided and unshielded prisoner to the prosecutorial gladiator.

ARGUMENT

I. THE PROSECUTION'S CALCULATED, UNPROFESSIONAL AND INFLAMMATORY CLOSING ARGUMENT ROBBED THE DETERMINATION OF PETITIONER'S GUILT OF THE FUNDAMENTAL FAIRNESS REQUIRED BY DUE PROCESS AND DEPRIVED THE DETERMINATION OF SENTENCE OF THE RELIABILITY REQUIRED BY THE EIGHTH AMENDMENT.

There is no dispute about the nature of the prosecution's conduct; it has received universal condemnation. The federal district court observed that: "Anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility, Canon 7, EC 7-24, and DR 7-106(c)(4) could not possibly improve upon th[is] example." 513 F.Supp. at 955. (J.A. 246) The Florida Supreme Court acknowledged that "under ordinary circumstances [it] would constitute a violation of the Code of Professional Responsibility." 329 So.2d at 290. (J.A. 48) The majority of the court of appeals acknowledged that the argument "can only be described as tasteless and unprofessional . . .," 699 F.2d at 1036, (J.A. 277) noting that it "contained

personal opinions" in violation of the Code and that "the prosecutor's comments would have been reversible error in an appeal from a federal case." *Id.* at 1035-36. (J.A. 278) The district court described the argument as "a series of utterly tasteless and repulsive remarks . . .," "pointless," 513 F.Supp. at 955, and a "tirade." *Id.* at 953. (J.A. 247, 248, 243) The dissenting justices in the Florida Supreme Court noted that the "remarks of the prosecutor in the case at bar can only be characterized as vituperative personal attacks upon the appellant and as appeals to passion and prejudice." 329 So.2d at 293. (J.A. 56). The federal magistrate referred to the "numerous instances of prejudicial prosecutorial argument" as "improper, repeated, prejudicial." Magistrate's Report at 22. Even the state concedes: "No one has ever even weakly suggested that McDaniel's closing remarks were anything but improper. . . ." 513 F.Supp. at 952. (J.A. 240-241)

We show below that this extreme misconduct deprived petitioner of fundamental fairness in the determination of his guilt or innocence and of reliability in the determination of his sentence. That being so, the ensuing prejudice is palpable. If a defendant is convicted and sentenced to death as a result of proceedings that are fundamentally unfair and unreliable, prejudice is presumed; the burden is properly cast on the state to show that there was none. But even if petitioner bore the burden, the circumstances and extent of *this* misconduct in the context of *this* case demonstrate prejudice.

In the sections that follow, we first discuss the standards that control analysis under the due process clause. We then consider the claim as to sentence in light of the eighth amendment standards repeatedly reaffirmed by this Court. Finally, we assess the prejudice to Mr. Darden on the unique facts of this case.

A. Mr. Darden Was Denied Fundamental Fairness In The Determination Of His Guilt Or Innocence

"[N]ot every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe the fundamental fairness essential to the very concept of justice.'" *Donnelly* v. *De Christoforo*, 416

U.S. 637, 642 (1974) (quoting *Lisenba* v. *California*, 314 U.S. 219, 236 (1941)). But some do.

> The relevant question . . . inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

Adamson v. *California*, 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring).

The Court is not left at large in this inquiry.

> [S]tate criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and this country.
>
> The question thus is whether given this kind of system a particular [rule] is fundamental—whether, that is, [it] is necessary to an Anglo-American regime of ordered liberty."

Duncan v. *Louisiana*, 391 U.S. 145, 149-50 (1968); *accord Johnson* v. *Louisiana*, 406 U.S. 356, 372 n.9 (1972) (Powell, Jr., concurring) ("the focus is, as it should be, on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States."). The "better guide . . . is disclosed by 'the existing laws and practices in the Nation.' " *Baldwin* v. *New York*, 399 U.S. 66, 70 (1970) (quoting *Duncan*, 391 U.S. at 161).

On this score, there is no doubt. The calculated, inflammatory argument of the prosecution in this case did more than draw the universal condemnation of the courts below. It violated the specific prohibitions embodied in the law of every state and the District of Columbia, for each state has adopted either the Code of Professional Responsibility or the new ABA Model Rules of Professional Conduct (1983). The Code provides that:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case . . .
>
> (2) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
>
> (3) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, . . . or as to the guilt or innocence of an accused . . .

DR 7-106(C). These prohibitions have been carried forward without charge in the Model Rules, Rule 3.4(e). The ABA Standards for Criminal Justice (2d ed. 1980) provide:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it might draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
>
> (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

Id. § 3-5.8.[10]

The prosecutor in this case flouted each and every one of these proscriptions: He interjected irrelevant issues such as

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[10] Identical restrictions apply on the conduct of the defense. *Id.*, § 4-7.8.

the culpability of the prison system; he asserted personal opinions and beliefs regarding the veracity of facts stated by Mr. Darden in his sworn testimony and not rebutted by any evidence in the case; he expressed a personal opinion of Mr. Darden's guilt and repeatedly asserted his personal opinion that Mr. Darden was lying. Moreover, his entire argument was calculated to inject into the trial issues broader than guilt or innocence: the appropriateness of the death penalty (which he argued extensively at the guilt/innocence stage after expressly acknowledging that it was not an issue at that stage); the public misforture that Mr. Darden had not yet been killed by a shotgun, automobile accident, or suicide; the culpability of the prison system; Mr. Darden's culpability for having a driver's license and a girlfriend; and the need to execute Mr. Darden to insure that he did not get out and commit other crimes. McDaniel repeatedly and shrewdly appealed to the passions and prejudices of the jury. All of this served only to divert the jury from what it should have focused on at the guilt/innocence stage: the evidence, and whether Mr. Darden was in fact the guilty man.

The Code, the Model Rules, and the ABA Standards are not, even by dint of the universality of the consensus they express, *ipso facto* incorporated into the due process clause. But, as has been expressed elsewhere at greater length,[11] neither are they the expression of a mere ethical nicety. Rather, as explained in the ethical considerations accompanying the rule,[12] they serve as a necessary concommitant to the principle that: "In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion

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[11] Brief of a Group of American Law School Teachers of Professional Responsibility *Amici Curiae* in Support of the Petition for Certiorari in *Tucker* v. *Kemp*, No. 85-5496, filed October 28, 1984.

[12] Although "[t]he ethical considerations are aspirational in character. . . ," Code of Professional Responsibility, Preamble and Preliminary Statement at 1, they also express "the reasons underlying these standards." *Id.* at n.7.

of all other considerations." EC 7-24. "Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law . . .; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider." EC 7-25.

These concerns mirror directly the concerns of the due process clause. "Court proceedings are held for the solemn purposes of endeavoring to ascertain the truth which is the sine qua non of a fair trial." *Estes* v. *Texas*, 381 U.S. 532, 540 (1965). "This Court has declared that one accused of crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . other circumstances not addressed as proof at trial." *Taylor* v. *Kentucky*, 436 U.S. 478, 487 (1978); *accord Estelle* v. *Williams*, 425 U.S. 501, 503 (1976).

The constitutional vice of the arguments exhibited here is precisely the same as the ethical one: "the focus of the trial, and the attention for the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern of a criminal proceeding." *Stone* v. *Powell*, 428 U.S. 465, 489-90 (1976). Arguments that inject passion and prejudice, inflame the jury, invoke prosecutorial position and expertise to preempt determination of the credibility of witnesses and the truthfulness of evidence "deflect[] the truthfinding process . . ." *Id.* at 490.[13] Similarly, arguments about the mistakes of the prison system or the parole board,

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[13] In *Harris* v. *State*, 414 So. 2d 557 (Fla. 3d DCA 1982), a case much like this one, an eyewitness identified the defendant as twice having robbed a laundromat. The defendant testified that he had not been in the laundromat on either date. The prosecutor made references to the rampage of crime in the community and expressed his personal belief in the defendant's guilt. The District Court of Appeals reversed the conviction. "It is the responsibility of the prosecutor to seek justice, not merely to convict. That responsibility will be more nearly met when the jury is permitted to reach a verdict on the merits without counsel indulging in appeals to sympathy, bias, passion, or prejudice." *Id.* at 558.

the appropriateness of the death penalty, and the defendant's purported future dangerousness have no place at the guilt/innocence stage; "it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden or proving beyond a reasonable doubt that the defendant is guilty . . ." *Beck* v. *Alabama*, 447 U.S. 625, 642 (1980).

The universal consensus of the organized Bar, adopted as the law of each of the fifty states and the District of Columbia, shows that prosecutorial misconduct of these kinds threatens the "just and informed decisions" necessary to our system of truthfinding. *See* EC 7-24. That consensus is persuasive evidence of the meaning of due process in our system.

This conclusion is buttressed by the decisions of this Court. In *Donnelly* v. *De Christoforo*, the Court phrased the inquiry as whether "a prosecutor's remark . . . so infected the trial with unfairness as to make the resulting conviction a denial of due process." 416 U.S. at 643. On the basis of "an examination of the entire proceedings . . .," *id.*, the Court concluded that it did not. It premised that conclusion on three factors.[14] First, the remark in *Donnelly* was "an ambiguous one. . . ." *Id.*, at 645. Second, it "was but one moment in an extended trial . . . ." *Id.* Third, it "was followed by specific disapproving instructions." *Id.*

"Here, in contrast, the prosecutor's remarks were quite focused, unambiguous, and strong." *Caldwell* v. *Mississippi*, 472 U.S. ____, 86 L.Ed.2d 231, 246 (1985). They were woven throughout the whole fabric of the prosecutor's summation. Unlike *Donnelly*, there was no curative instruction.[15] Al-

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[14] The *Donnelly* Court first distinguished the case in "which the prosecutor's remarks so prejudiced a specific right . . . as to amount to a denial of that right . . . ," 416 U.S. at 643, in determining to apply the more general standard of due process. *Id.*

[15] There were instructions to the jury that it should consider only the evidence. *See* R. 824, 862, & 864. And there had been a warning *before* the summation that arguments are not evidence. But there

though he trial judge in Mr. Darden's case did not go quite as far in endorsing the improper comment as did the judge in *Caldwell*, 86 L.Ed.2d at 243, he came close. He both endorsed the lawyers' summations generally beforehand[16] and brushed aside or overruled the objections to the prosecutor's argument, thus effectively indicating "to the jury that the remarks were proper. . . ." *See Caldwell*, 86 L.Ed.2d at 243.

In *Donnelly*, the Court also noted that "closing arguments . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." 416 U.S. at 646-47.[17] Here, in contrast, the meaning was crystal clear. The offending comments were not limited to a single, isolated remark but rang out recurrent themes central to the summation.

Indeed, the very nature of these improper comments—invoking irrelevant issues designed to inflame the jury and motivate it to convict the defendant—point unerringly to the conclusion that the prosecutor employed "improper methods calculated to produce a wrongful conviction. . . ." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). There is no other explanation for the fact that McDaniel focused on the need for the death sentence in his arguments at the guilt/innocence stage of the trial. As the district court found: "It is apparent in reading

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was no curative instruction. There were no instructions after the summations either that the prosecutors had erred or that arguments are not evidence.

[16] The trial judge had admonished the jury before closing argument that it could rely on the expertise and experience of counsel and that, therefore, their views on the evidence would be very helpful. R. 713-14. The prosecutors took advantage of this and asked the jury to accept their personal beliefs of Mr. Darden's untruthfulness and guilt.

[17] The *Donnelly* Court acknowledged that "these general observations in no way justify prosecutorial misconduct," *id.* at 647, but instead merely served to show that it was not necessarily true that the jury had drawn the impermissible inference from the prosecutor's ambiguous remark. *Id.*

the arguments in their entirety . . . that the prosecutor had a dual purpose in mind when he attacked the Division of Corrections . . . , he was also making, in effect, his principal argument in support of the death penalty." *Darden*, 513 F. Supp at 953. (J.A. 243) "This conclusion is buttressed by the fact that, at the conclusion of the penalty phase of the trial, the prosecutor's argument to the jury is contained on a single page of transcript." *Id.* at 953 n.10. (J.A. 243-244) Yet, at the guilt/innocence stage, "the central issue" was whether Mr. Darden was the guilty man, "whether the state ha[d] satisfied its burden of proving beyond a reasonable doubt that the defendant [wa]s *guilty* of a capital crime." *Beck*, 447 U.S. at 642 (emphasis added).

Given that the prosecutorial arguments prohibited by the Code, the Model Rules, and the ABA Standards—and exhibited in this case—serve only to pervert and distort the truthfinding process, it is wholly inappropriate to require the defendant to prove that he was prejudiced by them. "Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. . . . Moreover, such circumstances involve impairments . . . that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland* v. *Washington*, ___ U.S. ___, 80 L.Ed.2d 674, 696 (1984). "When the prosecutor's conduct is considered to have transgressed the basic principles of fair play embodied in the due process clause . . . the standard is strict indeed." *Kyle* v. *United States*, 297 F.2d 507, 513 (2d Cir. 1961) (per Friendly, C.J.).[18] Such "constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it the burden to show that it was harmless." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

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[18] Judge Friendly noted that:

> The conclusion we draw . . . is that the standard of how serious the probable effect of an act or omission at a criminal trial must be in order to obtain the reversal . . . is in some degree a function of the gravity of the act or omission; the strictness of the application of the harmless error standard seems somewhat to vary,

This conclusion is corroborated by the Court's recent decision in *Caldwell*. The Court found that the specific comments at issue in that case "so affect[ed] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." 86 L.Ed.2d at 246. In reaching that conclusion, it observed: "Because we cannot say that this effort had *no effect* on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 247 (emphasis added). By the same token, convictions obtained by such fundamentally unfair proceedings must be reversed: "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck*, 447 U.S. at 638 (quoting *Gardner* v. *Florida*, 430 U.S. 349, 358 (1978)) (footnote omitted).

B. Mr. Darden Was Denied Reliability In The Determination His Of Sentence

The effect of McDaniel's impermissible arguments on sentencing must also be considered. For as the district court found, this *was* his argument on sentencing; the prosecutor made no other argument to speak of. 513 F.Supp. at 953 and n.10. (J.A. 243-244).

The effect of his argument was to inflame the jury, to evoke its passions and invoke its prejudices, and to lead it to impose the death penalty for impermissible reasons. McDaniel repeatedly wished that Mr. Darden had killed himself, slit his own throat, shot himself, or wrapped himself around the pole in the

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and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play.

297 F.2d at 514. On this basis, Judge Friendly concluded that for deliberate prosecutorial misconduct, as is true in Mr. Darden's case, the showing of prejudice required should be at its nadir and the harmless error rule should apply. *Id.* at 514-15.

automobile accident. He referred to him as an animal and as needing "a leash on him and a guard at the other end of that leash." R. 750. (J.A. 16) He asked the jury to strike a blow at the correctional system responsible for Mr. Darden's furlough and urged his personal opinion that *its* irresponsibility required the death sentence: "That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it." R. 753. (J.A. 17) He did not fail to invoke race, noting the description of the assailant as "the colored male . . . , R. 763, (J.A. 22) and closing with the "circumstantial evidence, surrounding that wreck, the time, the place, his color . . . ." R. 781. (J.A. 32).

In making these arguments, McDaniel violated each relevant provision of the Code and the ABA Standards. He argued matters that he had "no reasonable basis to believe . . . relevant" and that were "not . . . supported by admissible evidence." DR 7-106(C)(1). He asserted his personal knowledge of these "facts," which he had thus improperly put in issue. *Id.*, subsection (3). He asserted his personal opinion on the justness of the death sentence in this case. *Id.*, subsection (4). He used argument "calculated to inflame the passions or prejudices of the jury." ABA Standards § 3-5.8(c). And he "ma[de] predictions of the consequences of the jury's verdict" when that question was not open to consideration under the applicable sentencing law. *See id.*, subsection (d).

In violating these ethical proscriptions and in making these impermissible arguments, McDaniel deprived Mr. Darden of a trial that satisfied the "heightened 'need for reliability in the determination that death is the approprite punishment in a specific case . . . ,'" *Caldwell*, 86 L.Ed.2d at 246 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)), which has been a repeated concern of this Court. *See, e.g., California* v. *Ramos*, 463 U.S. 992, 998-99 (1983). A sentence of death obtained in this manner cannot be countenanced without disregarding the "vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358. The argu-

ments used in this case were (to invert Justice O'Connor's observation) "extraordinary measures to ensure that the prisoner to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was . . . imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

Under these decisions, an exacting scrutiny is demanded of the process by which death is imposed. As Judge Friendly noted in *Kyle:*

> [T]he pans contain weights and counterweights other than the interest in a perfect trial. Sometimes only a small showing of preducice, or none, is demanded because that interest is reinforced by the necessity that "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach," . . . and by the teaching of experience that mere admonitions are insufficient to prevent repetition of abuse.

297 F. 2d at 514 (quoting *People* v. *Savvides*, 1 N.Y. 2d 554, 154 N.Y.S. 2d 885, 136 N.E. 2d 853 (1956) (per Fuld, J.)). The Court recognized this point in its decision in *Caldwell* just last Term, and demanded that we be able to say that the improper argument "had no effect on the sentencing decision. . . ." 87 L.Ed.2d at 247. Especially in light of the persistence of unchecked prosecutorial misconduct of this sort, *see* Brief of a Group of American Law Teachers of Professional Responsibility as *Amici Curiae* in *Tucker* v. *Kemp*, No. 85-5496, at 10-12, it is clear that *Caldwell* struck the correct balance. Accordingly, this death sentence must be reversed.

C. Although Mr. Darden Is Entitled To Relief Under The Harmless Error Doctrine, He Suffered Actual And Substantial Prejudice

The magistrate's assessment of the effect of McDaniel's argument is difficult to fault.

> The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eye-witness testi-

> mony of the victims.[19] All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony. Defense counsel's objection to the prosecutor's argument was late and tentative. The trial judge overruled the objection thereby making it appear that the argument could be properly considered by the jury.
>
> The question which then must be asked is: In the context of the entire trial did the prosecutor's improper arguments either have a substantial influence on the jury's determination of guilt, or is there grave doubt what influence the argument did have on the jury?

Magistrate's Report at 22. (J.A. 214).

Having articulated the proper standard under *Donnelly* and closely presaged this Court's later formulation in *Caldwell*, the magistrate then considered the trial as a whole.

> Petitioner's trial counsel put in issue the credibility of the victim's identification by cross-examination and *proper jury* argument. Darden's testimony at trial included a denial of the offenses, and of [sic] an alibi, testimony which "appeared on its face to be sincerity." (Trial Judge's Findings of Fact for Sentence).
>
> In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, *I have more than grave doubts* that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. *I am convinced that the jury deliberation was substantially influenced by* the improper argument and that the jury was prejudiced against Darden by the argument.

Magistrate's Report on 22-23 (emphasis added). (J.A. 214-215).

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[19] The state trial judge also recognized that the prosecution's case on the issue of the identification of Mr. Darden is the killer was open to doubt. No other meaning can be ascribed to his finding Mr. Darden's repeated protestations of "complete innocence" as a mitigating factor. If guilt were clear, a defendant's protestations of innocence would hardly be deemed mitigating; they would more likely be interpreted as defiance.

The magistrate was correct. The ordinary problems of eyewitness identification aside,[20] cross-racial identification, as in this case, is the least reliable. Barkowitz and Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12 Journal of Applied Social Pschology, 4:255 (1982); Brigham and Maass, *Accuracy of Eyewitness Identifications in a Field Setting*, 42 Journal of Personality and Social Psychology 673 (1982); Yarmey, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 130-35 (1970); Note, *Did Your Eyes Decieve You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan.L.Rev. 969, 982 (1977). When that cross-racial identification is subject to legitimate challenge as influenced by suggestive procedures,[21] the prosecutor's impermissible attempts in argument either to bolster the identification or to obscure the issue cannot be discounted as unimportant or insubstantial.

McDaniel certainly did not think so. No prosecutor would risk reversal by engaging in such a calculated and extended cavalcade of unprofessional comments unless he felt unsure of his evidence and uncertain of a verdict. Again, this is not a case of an isolated or impromptu remark that might have harmed the defendant; this was a deliberate, internally coherent di-

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[20] There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, "[T]hat's the man!"

Kampshoff v. *Smith*, 698 F. 2d 581, 585 (2d Cir. 1983).

[21] In *Kampshoff*, supra, n.20, the eyewitness identification was impermissibly tainted by the fact that the witness saw a television broadcast of petitioner's picture. Here Mr. Arnold had seen newspaper accounts of Mr. Darden's arrest and Mrs. Turman first saw and identified Mr. Darden in a courtroom in which he was the only black.

atribe that repeated and intertwined three basic, impermissible themes. It ended in a carefully orchestrated crescendo affirming the reliability of the eyewitness identification on the basis of race and the need to convict both the defendant and the Department of Corrections. "Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Estelle* v. *Williams*, 425 U.S. at 504. Common sense indicates that there is no reason a senior, experienced prosecutor (*see* R. 749) would employ such impermissible techniques except to prejudice the jury and bolster a sagging case.

The courts below relied instead on various technical, "contextual" considerations in concluding that there was nevertheless no harm to the defendant. Their reasoning does not withstand scrutiny. For example, both the Florida Supreme Court and the district court relied heavily on the concept of invited error. The Florida court felt that the prosecutor's use of the term "animal" and the repeated expressions of his wish that the defendant had been shot or had killed himself were "invited" by defense counsel's concession that the assailant was an animal. While it is entirely unclear how this statement by the defense "invited" either the death wish statements or the other impermissible prosecutorial arguments, it is at least "[c]lear [that] two improper arguments—two separate wrongs—do not make for a right result." *United States* v. *Young*, 470 U.S. ___, 84 L.Ed.2d 1, 9 (1985).

Similarly, the district court asserted that the extensive and repeated expressions by both prosecutors of their personal beliefs that Mr. Darden was a liar, that he was guilty, and that his death was the necessary response to the irresponsibility of the Department of Corrections were somehow invited by the two relatively minor expressions of personal opinion by Mr. Maloney. 513 F.Supp. at 955. "Reviewing courts ought not to be put in the position of weighing which of two inappropriate arguments was the lesser." *Young*, 84 L.Ed.2d at 11. Nevertheless, it cannot fairly be said that two inappropriate remarks by a young defense counsel made in the throes of argument that expressed a personal opinion about the sufficiency and weight

of the evidence are the equivalent of—and will carry the same weight with the jury as—numerous, repeated, deliberate comments of a senior prosecutor expressing personal opinions about guilt and credibility. Indeed, it is apparently the rule both in Florida[22] and many other jurisdictions[23] that the expression of personal opinion regarding the weight of the evidence, as distinct from guilt or innocence, is permissible.

According to the analysis of the district court, the argument by Maloney that the evidence was not enough "to kill that man [Darden,]" made at the end of his summation, R. 737, opened the door to the prosecutor's arguments for the death penalty. 513 F.Supp. at 953-54. (J.A. 243-244) The problem with that analysis is threefold. First, at most, it invited the prosecutor to respond—as he did in part—that the question of sentence would be dealt with later and that only guilt or innocence was at issue at that stage. Second, even if one assumes that it also invited the prosecutor to remark that he would seek the death penalty at the appropriate time, it certainly did not invite him to make his entire sentencing argument at the guilt/innocence stage as the district court found he did. 513 F.Supp. at 953 & n.10. (J.A. 243-244) Third, the judge had already ruled at the start of Maloney's summation that the identical comment was proper. R. 730. As *Young* makes clear, the primary responsibility for controlling improper argument lies with the trial judge. 84 L.Ed.2d at 11. Here it was the trial judge who allowed the escalating juggernaut of improper argument to get started. Mr. Darden should not pay for that with his life.

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[22] *See, e.g., Roundtree* v. *State*, 229 So.2d 281 (1st DCA 1969), *app. dismissed*, 242 So.2d 136 (Fla. 1970); *Coleman* v. *State*, 215 So.2d 96 (Fla. 4th DCA 1968).

[23] "Though prohibiting the expression of a personal conviction as to defendant's guilt, courts have accepted statements offered as a personal conclusion as to the strength of the evidence." Y. Kamisar, W. LaFave, & J. Israel, MODERN CRIMINAL PROCEDURE 1450 (5th ed. 1980); *see also* Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J.Crim.L. & C. 22, 45-46 (1973); Annotation, 88 A.L.R.3d 449 (1978).

The Florida Supreme Court relied on two other considerations in finding no error: "the totality of the record . . . in these uniquely vicious crimes . . ." and the "overwhelming eyewitness and circumstantial evidence." 329 So.2d at 290, 291. At best, however, the heinous nature of the crime excused only the "animal" comments. The strength of the eyewitness testimony was the very thing the prosecutor was seeking to bolster by impermissible argument. Neither of these considerations can establish "harmless error . . . in this particular case." 329 So.2d at 290. (J.A. 50).

Finally, the lower federal courts relied on one more technical argument: "the Court instructed the jury on two occasions that the argument of counsel was not evidence. . . ." 699 F.2d at 1036 (quoting 513 F.Supp. at 958). (J.A. 278) In fact, there was *one* such instruction, but it came *before* the prejudicial summation. *See* nn. 15-16 *supra*. Afterward, the court gave *no* instructions touching the question of arguments; it did tell the jury during the course of a lengthy charge that it should consider only the evidence. But that was too little, much too late. *Compare Caldwell*, 86 L.Ed.2d at 249, 252 (Rehnquist, J., dissenting).

Recent decisions of the Eleventh circuit would require that a defendant show "a reasonable probability that, but for [the improper prosecutorial] arguments, the death penalty would not have been given." *Brooks* v. *Kemp*, 762 F.2d 1383, 1413 (11th Cir. 1985) (en banc).[24] They would apply this standard even when the court "cannot conclude that these few improper remarks had no prejudicial effect on the jury . . . ," if the court is "satisfied that the prejudice was not severe.: *Id.* at 1415. Putting aside the question whether these decisions survive *Caldwell*, their standard would not control Mr. Darden's case; here, the improper remarks were not "few" nor was the prejudice less than "severe." Here, the remarks were calculated to obscure the central issues and did so, to Mr. Darden's actual

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[24] *Accord Drake* v. *Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc); *Tucker* v. *Kemp*, 762 F.2d 1480 (11th Cir. 1985) (en banc); *Tucker* v. *Kemp*, 762 F.2d 1496 (11th Cir. 1985) (en banc).

and substantial prejudice. It is difficult to imagine a more egregious and deliberate closing argument than that in this case. The prosecutor's incendiary argument was tossed into the powder keg of a black/white killing, with sexual advances on the victim's widow, where the primary factual question was whether the police had arrested the right "colored male." (J.A. 32). Because the extensive improper remarks were of a sort calculated to interfere with the reliability of the jury's determination, "we cannot say that this effort had no effect . . . ," *Caldwell*, 86 L.Ed.2d at 247. Petitioner's conviction and sentence of death must be reversed.

II. THE EXCLUSION FOR CAUSE OF VENIREMAN MURPHY CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN *WAINWRIGHT* V. *WITT*, UNDER WHICH OPPOSITION TO CAPITAL PUNISHMENT ALONE IS AN *INSUFFICIENT BASIS FOR DISQUALIFICATION*.

In *Wainwright* v. *Witt*, 469 U.S. ____, 83 L.Ed.2d 841 (1985), this Court modified the test of *Witherspoon* v. *Illinos*, 391 U.S. 510 (1968), which governs the exclusion of prospective jurors in capital cases on the basis of their views about capital punishment. The Court was careful to state, however, that it "adhere[d] to the essential balance struck by the *Witherspoon* decision." 83 L.Ed.2d at 852 n.5. That "essential balance" prohibits the exclusion for cause of "jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Id.* at 850. In other words, opposition to capital punishment alone is not a sufficient basis for disqualification. Something more must be shown.

To be sure, *Witt* did modify the *Witherspoon* test as to precisely what more must be shown. Applying the standard of *Adams* v. *Texas*, 448 U.S. 38 (1980), the Court held as follows:

> [A] juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his*

> *duties as a juror in accordance with his instructions and his oath.*

83 L.Ed.2d at 849 (emphasis in original) (quoting *Adams*, 448 U.S. at 45); 83 L.Ed.2d at 851-52. But in the absence of the showing required by *Witt*,[25] a venire member may not be excluded simply because he holds strong views against capital punishment.

Measured by these principles, the exclusion for cause of venireman Murphy at petitioner's trial cannot be upheld. For Murphy was excused solely on the basis of the following question and answer:

> THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable *without violating your own principles* to vote to recommend a death penalty regardless of the facts?
>
> MR. MURPHY: Yes, I have. (J.A. 9).

R. 165 (emphasis added). The trial judge never determined whether or not Murphy's "own principles" relating to capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Murphy was never once questioned as to whether he could set aside his personal beliefs or private principles and perform "his duties as a juror in accordance with his instructions and his oath." Instead, he was summarily excluded solely because of his affirmative answer to a single question demonstrating only that he held strong principles in opposition to capital punishment—principles which he would have to subordinate if he were to serve as a juror. Whether or not he could in fact subordinate those principles and serve was never determined.

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[25] *Witt* also reiterates that, "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." 83 L.Ed.2d at 851.

The only way to uphold Murphy's exclusion would be to assume that any individual who has strong principles against capital punishment would *automatically* be unable to restrain those principles and would therefore be "substantially impaired" in the performance of his duties as a juror. But that is not the law. The very essence of the *Witherspoon* balance, adhered to in *Witt*, cries out to the contrary:

> It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he preceived to be his duty to abide by his oath as a juror and to obey the law of the State.

Witherspoon v. *Illinois*, 391 U.S. at 514-15 n.7. *Adams* v. *Texas*, the decision upon which *Witt* is based, makes the same controlling point:

> [I]t is entirely possible that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

448 U.S. at 44-45 (quoting *Boulden* v. *Holman*, 394 U.S. 478, 483-84 (1969). Thus, to say that Murphy's exclusion may be upheld because he could not vote for capital punishment without violating his own strong principles is a complete *non sequitur*. At no time was it shown that Murphy would have any difficulty curbing those principles, following the law, and doing his civic duty as a responsible juror in accordance with his instructions and his oath.

In *Witt*, this Court upheld the exclusion of a venire member who admitted that her personal views about capital punishment would interfere with the performance of her duties as a juror. 83 L.Ed.2d at 846. Unlike venire member Colby in *Witt*, Murphy here said no such thing. The difference between the two prospective jurors was succinctly stated by Judge Johnson of the Eleventh Circuit, dissenting from that Court's affirm-

ance of the denial of habeas corpus relief upon remand from this Court:

> Colby stated that a conflict between belief and duty would interfere with performance of duty, while Murphy said only that a conflict would exist. The fact that a conflict exists between belief and duty tells a judge absolutely nothing about how the juror will react when faced with that conflict.

Darden v. *Wainwright*, 767 F.2d at 759 n.3. (J.A. 389).

Because the trial judge did not employ the correct standard in questioning Murphy, this Court should not defer under *Witt* to the judge's finding that the venireman deserved to be excluded. Recognizing that the judge's understanding and application of the correct standard is central to a determination that the exclusion was presumptively correct, this Court in *Witt* looked closely at the standard employed by the trial judge:

> [T]here is every indication that the judge indeed applied the correct standard. Although the judge did not participate in questioning venireman Colby, the record shows that on several subsequent occasions during voir dire he did participate in questioning. On each of those occasions the judge asked questions entirely consistent with the *Adams* standard.

83 L.Ed.2d at 856.

In the present case it was the trial judge himself who personally questioned the venireman at issue. His questioning of Murphy was hardly "consistent with the *Adams* standard." Furthermore, as noted in Judge Johnson's dissent below, the trial judge announced this incorrect standard at the very opening of the voir dire and again at a later point after Murphy's exclusion. 767 F.2d at 755-57. (J.A. 387-388) And the exclusion for cause resulted solely from his failure to employ the correct standard—not from any ambiguity or indecisiveness in the venireman's answer. Murphy gave a direct and straightforward answer—"Yes, I have"—but to the wrong question. That was the only question directed at him concerning his views

about capital punishment.[26] In contrast to *Witt*, where Mr. Colby answered six questions on the subject, there was no colloquy here which could give rise to any presumption of a finding as to demeanor or credibility.[27]

This is simply a case in which the trial judge employed a constitutionally incorrect standard in his questioning of a prospective juror and, therefore, obtained a constitutionally inadequate answer. Habeas corpus relief should be granted.[28]

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[26] Murphy had just been seated in the jury box a moment earlier, and had not been the subject of any previous group or individual questioning about capital punishment. R. 165. (J.A. 9).

[27] The Court below erroneously stated that defense counsel did not object to Murphy's exclusion. 767 F.2d at 754. (J.A. 379) At the outset of the voir dire, during the same discussion in which the trial judge announced that he would exclude any venire member who "if he did follow it [the law], would be going against his principles," the judge granted defense counsel a *continuing* objection to such exclusions. R. 18-19. (J.A. 6-7) Following Murphy's exclusion the judge explicitly directed the court reporter to note defense counsel's objection pursuant to that ruling. *Id.* at 165.

[28] Although the jury's role in sentencing in Florida capital cases is advisory, the trial judge may not overrule a jury recommendation of mercy unless " 'the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ.' " *Proffitt* v. *Florida*, 428 U.S. 242, 249 (1976) (plurality opinion). *Witherspoon*, of course, applies to the selection of any "jury that imposed *or recommended*" a death sentence. *Witherspoon* v. *Illinois*, 391 U.S. at 522 (emphasis added); *see id.* at 518 n.12. And this Court has expressly held that even one unconstitutional exclusion for cause requires reversal of the sentence of death. *Davis* v. *Georgia*, 429 U.S. 122 (1976).

III. PETITIONER'S DEATH SENTENCE SHOULD BE VACATED BECAUSE HE WAS BEREFT OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHICH DEPRIVED HIM OF A FULL, FAIR, AND INDIVIDUALIZED DETERMINATION OF WHETHER HE SHOULD LIVE OR DIE.

A capital sentencing proceeding in which the sentencer cannot give

> independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for less severe penalty.

Lockett v. *Ohio*, 438 U.S. 586, 605 (1978). Without consideration of "compassionate and mitigating factors stemming from the diverse frailties of humankind," a capital defendant would be but one of a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). *Accord Zant* v. *Stephens*, ___ U.S. ___, 77 L.Ed.2d 235, 251 (1983).[29] Accordingly, the Court has vacated death sentences imposed where nonstatutory mitigating evidence was precluded either by statute, *Lockett* v. *Ohio;* by state court practice, *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 (1982); or by state rules of evidence, *Green* v. *Georgia*, 442 U.S. 95, 97 (1979). This case asks whether the same relief is due when that deprivation is caused by counsel's mistakes.

At the habeas hearing before the magistrate, trial counsel Maloney explained the failure to develop and present nonstatutory mitigating evidence as premised on an understanding that the Florida statute precluded such evidence. "[A]fter a perusal of the mitigating circumstances in the Florida Statute 921.141 [,] . . . we reached the conclusion that Mr. Darden did not qualify" for any of the statutory factors. H.C.

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[29] Such evidence "may make a critical difference, especially in a capital case." *Stanley* v. *Zant*, 697 F.2d 955, 969 (11th Cir. 1983).

154. (J.A. 163). In apparent candor, Maloney conceded: "I was completely unaware that any mitigating circumstance, if relevant, is admissible." *Id.* (J.A. 162).

Counsel's interpretation of the statute had some support,[30] and was even adopted in some later Florida cases,[31] but it made

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[30] Florida's 1972 capital sentencing statute confined the jury's sentencing deliberations to three issues:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and
>
> (b) Whether sufficient mitigating circumstances exist *as enumerated* in subsection (7), which outweigh aggravating circumstances found to exist, and
>
> (c) Based on these considerations whether the defendant should be sentenced to life or death.

Fla. Stat. § 921.141(2)(a), (b), (c) (emphasis added). The judge's ultimate decision operated within the same statutory confines. Fla. Stat. § 921.141(3). *See, e.g.*, Vance, *The Death Penalty After Furman*, 48 Notre Dame Lawyer 850, 855 (1973) (Under the new Florida statute, "capital felonies and their attendant aggravating or mitigating circumstances are carefully spelled out.").

Not only did the statute appear restrictive on its face; the Florida legislature intended it to be. *See* Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett* v. *Ohio, and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal. L. Rev. 317, 358 n.199 (1981). Soon after *Lockett* announced the constitutional requirements that mitigating evidence be unrestricted, the Florida legislature amended the statute. It deleted the words of restriction, "as enumerated in subsection (7)," from subsection (2)(b)'s reference to mitigating circumstances, and specifically added a clause to permit the introduction of evidence of "the nature of the crime and the character of the defendant." 1979 Fla. Laws ch. 79-353. These provisions would not have been necessary unless the prior statute was indeed restrictive.

Six months before petitioner's trial, the Florida Supreme Court had interpreted the statute as restricting the scope of mitigating evidence. *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973).

[31] *Cooper* v. *State*, 336 So.2d 1133, 1139 n.7 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). *See also Gibson* v. *State*, 351 So.2d 948, 951

no sense in the context of Mr. Darden's case. For the trial court repeatedly and emphatically assured the defense that it could "go into any other facts [beyond the statute] that might really be pertinent to full consideration of [petitioner's] case and the analysis of [petitioner] and [his] family situation, [his] causes or anything else that might be pertinent to what is the appropriate sentence." R. 887; *accord* R. 883-84, 888, 904. Counsel failed to understand the critical value of presenting factors broader and more personal than those embodied in the narrow statutory list.

Instead, counsel's principal pre-sentencing preparation consisted of one twenty minute interview in the course of a forty minute court recess. H.C. 373. Though the court offered to recess the trial for several days so that counsel could properly prepare for sentencing, R. 874, defense counsel preferred to "proceed[] rather quickly before the Jury," asking only for "10 or 15 minutes with the Defendant prior to starting this." R. 875.

Counsel made no effort to inform themselves of Mr. Darden's previous reputation for friendliness, good character, and non-violence.[32] Misfortunes in Mr. Darden's past—such as a life of extreme poverty and social deprivation, the premature death of his mother and its lasting effects on him, the desertion of his father and stepmother, the harsh treatment of North Carolina reform authorities who committed him to a juvenile institution for four years for pilfering a mailbox—never entered the decision on death. Because of counsel's misperception of the scope of a capital sentencing proceeding, neither judge nor jury was informed of even the nonstatutory information of value already available to defense counsel in two psychiatric reports. R. 885-86. One of these reports made note of petitioner's circumstances from childhood on and indicated

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& n.6 (Fla. 1977); *Barclay* v. *State*, 343 So.2d 1266, 1270-71 (Fla. 1977); *Songer* v. *State*, 322 So.2d 481, 484 (Fla. 1975).

[32] Mr. Darden had a previous conviction for assault with intent to commit rape. *Darden* v. *State*, 218 So.2d 485 (Fla. 2d DCA 1969).

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that he ran several businesses successfully, was well liked in the community, was considered non-violent by his acquaintances, and functioned—no doubt in large measure because of his early deprivations—at the dull normal I.Q. of 88.[33]

Trial counsel's poor performance had important eighth amendment consequences. It cost him the opportunity to present evidence of a difficult, stunting upbringing and a prior reputation for a solid, nonviolent character. Instead, it resulted in a sentencing presentation that lasted only a few minutes, occupying seven pages of transcipt. It cost him a closing argument, a last opportunity for a professional advocate to weave the widely varying threads of petitioner's circumstances and times into a life, and give meaning and depth and significance to it, in the jury's sentencing decision.

This Court has recently articulated a two-pronged standard for adjudicating claims of "actual ineffectiveness" of counsel. The performance component requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, ____ U.S. ____ , 80 L.Ed.2d 674, 693 (1984). *See also Smith* v. *Wainwright*, 741 F.2d 1248, 1254 (11th Cir. 1984). The second prong demands a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," *Strickland*, 80

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[33] Some nonstatutory mitigating evidence did find its way into the record, nevertheless. At the court's urging, Mr. Darden rose again to profess his innocence ("emotionally and with what appeared on its face to be sincerity") and to advise the jury that he was the father of a family of seven children. The trial court, demonstrating foresight unusual for the times, made note of these factors in his sentencing report. *But see. Darden* v. *State*, 329 So.2d 287, 291 (Fla. 1976) (where the Florida Supreme Court observed that there were "no mitigating circumstances to reduce the penalty from death"). (J.A. 50). Here again, however, counsel's judgment and training in persuasion were never brought to bear on this information and its presentation. Counsel's function shrivelled from advocate to mere presence in the courtroom.

L.Ed.2d at 698. *See Smith*, 741 F.2d at 1254. The Court defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 80 L.Ed.2d at 698.

In *Strickland*, defense counsel offered no further evidence at sentencing because of a "sense of hopelessness about the evidentiary effect of [the defendant's] confession" and because offering no evidence permitted him to argue facts about the defendant's background presented at an earlier plea colloquy without subjecting his client to cross-examination. 80 L.Ed.2d at 684. Counsel also knew that the judge favored "a convicted defendant who owns up to his crime." *Id.* at 685. On this basis, counsel in *Strickland* made an extensive closing argument, *id.* at 684, which the trial judge found "admirable." *Id.* at 686. In *Strickland*, the Court concluded that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 695. It concluded that, in the circumstances of that case, counsel's performance was reasonable.

Here, defense counsel's preparation for and presentation of a case at the sentencing phase were not reasonable. The decision not to investigate was not an informed, tactical judgment. Rather, it was reached because counsel neither knew the law nor attempted to investigate and find out the law governing sentencing. Indeed, even after the trial court made it clear that nonstatutory mitigating factors would be considered and that a continuance would be allowed so that counsel could prepare properly, counsel nevertheless rushed the case to judgment; they failed even to present the nonstatutory mitigating evidence already available to them. Counsel's argument on sentencing was hardly professional, much less "admirable," consisting of only a short statement that served to highlight the aggravating rather than the mitigating circumstances.

Unlike *Strickland*, where the Court concluded that the "overwhelming" evidence in favor of death made it improbable "that the omitted evidence would have changed the conclusion," 80 L.Ed.2d at 701, the substandard performance of

counsel in this case mattered very much. For the prosecutor argued extensively that Mr. Darden was no better than an animal, that he should be put to death because otherwise the prison system would release him again, and that society was already unlucky that Mr. Darden had not managed to kill himself. All of this was both beyond the record and beyond the pale. The sentencing hearing began only an hour later, in the wake of that argument. Had counsel offered the nonstatutory evidence discussed above, it might at least have counteracted these impermissible arguments. It would have offered the jury—which, without such evidence, nevertheless split over the question of punishment—information upon which it could have relied in considering life as an appropriate sentence for someone who was a human being with "the diverse frailties of humankind." *Woodson*, 428 U.S. at 304. Instead, it was urged to consider whether to extinguish an "animal" and thus strike a blow against an errant prison system.

Lockett and *Eddings* emphasize that: "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the charcter and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, 428 U.S. at 304. "A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to insure that the adversarial process works to produce a just result . . . .' *Strickland*, 80 L.Ed.2d at 693.

Here, counsel failed altogether to submit the question of life or death to adversarial testing, even after the trial judge invited them to do so and suggested a continuance. The prosecutor, on the other hand, had missed no opportunity to press home his point that "the animal" deserved death by execution if not by his own hand. Here, "the core purpose of the counsel guarantee" was thwarted; "confronted with both the intricacies of the law and the advocacy of the prosecutor . . .,"

United States v. *Ash*, 413 U.S. 300, 309 (1973), Mr. Darden was left with no assistance on either score. Rather, he literally stood up for himself, alone. Because this sentencing "Process los[t] its character as a confrontation between adversaries," and became instead the "sacrifice of unarmed prisoners to gladiators . . .," *United States* v. *Cronic*, ___ U.S. ___, 80 L.Ed.2d 657, 666-67 (1984) (quoting *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 640 (7th Cir. 1974)), the resulting sentence of death should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE JASPER DARDEN, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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26 September 1973	Indictment
23 October 1973	Preliminary Hearing
26 November 1973	Motion to Limit State Attorney on Voir Dire Examination
29 November 1973	Motion to Dismiss Counsel
12 December 1973	Request for Copies of Jury Questionnaires
27 December 1973	Motion for Waiver of Counsel
02 January 1974	Order—Transferring Venue
14 January 1974	Affidavit of Insolvency and Order Declaring Defendant Insolvent and Appointing Counsel
23 January 1974	Jury Trial (15-9 January 1974) Progress Reports
23 January 1974	Verdicts (19 January 1974)
23 January 1974	Advisory Sentence (19 January 1974)
23 January 1974	Findings of Fact for Sentence (and Sentence Hearing)
23 January 1974	Judgment and Sentence
31 January 1974	Notice of Appeal
18 February 1976	Direct Appeal Decision
19 April 1977	Certiorari Dismissed—United States Supreme Court
31 January 1979	Notice of Appeal
08 May 1979	Executive Clemency

Date Filed	Document
18 May 1979	First Death Warrant
21 May 1979	Post Conviction Proceeding at Trial Court Level
21 May 1979	Supreme Court of Florida Decision
21 May 1979	Initial Federal Habeas Corpus Petition
22 May 1979	Order—Staying Execution
22 October 1979	Federal Evidentiary Hearing
10 April 1981	Magistrate's Report
08 May 1981	Judgment in Favor of Respondent
08 June 1981	Notice of Appeal
12 June 1981	Order—Certificate of Probable Cause
05 August 1983	Second Death Warrant
01 September 1983	Order—Eleventh Circuit Stay of Execution
08 August 1985	Third Death Warrant
27 August 1985	Order—Eleventh Circuit Opinion Finalized
30 August 1985	Post Conviction Proceedings at Trial Court Level
03 September 1985	Supreme Court of Florida Decision
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03 September 1985	Notice of Appeal
15 October 1985	Order—Eleventh Circuit Opinion Finalized

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

Case No. CF73-2027C

STATE OF FLORIDA, PLAINTIFF

vs.

WILLIE JASPER DARDEN, DEFENDANT

Filed November 26, 1973

MOTION TO LIMIT STATE ATTORNEY ON VOIR DIRE EXAMINATION

COMES NOW the Defendant, by and through his undersigned counsel, and moves this Court for an order limiting the voir dire examination of the prospective jurors, and alleges:

1. That under the Supreme Court's ruling in *Witherspoon v. Illinois*, 389 U.S. 1035, 88 S.Ct. 793, 19 L.Ed. 822, the Supreme Court ruled that in a non-bifurcated trial, the prosecutor could be allowed to ask whether or not a juror would ever consider imposing the death penalty.

2. That subsequent to the enactment of Florida Session Law 72-724, Florida Statute 921.141 provides for two (2) deliberations by a Florida jury—one to consider guilt or innocence, and a subsequent deliberation to consider mercy or no mercy.

3. That any questions asked by a prosecutor relating to whether or not a juror would even consider capital punishment in no way relates to, is not reasonably related to nor relevant to a decision on the defendant's guilt or innocence and an answer by a juror that the juror could not consider the death penalty would not in any way affect the ability of the juror to participate fully and freely in deliberations on the questions of innocence or guilt.

4. That to allow the prosecutor to ask Witherspoon-type questions and be granted challenges for cause on the basis that the juror could not consider the death penalty unduly prejudices the defendant's right to a fair trial, in violation of his right to a fair and impartial jury trial and to due process in violation of the Fifth and Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida State Constitution.

WHEREFORE, the defendant requests that this Honorable Court enter an order limiting both the prosecution and the defense from asking any questions of the prospective jurors relating to their belief either for or against the death penalty and to deny any and all challenges for cause based upon Witherspoon-type questions.

/s/ J. O. Johnson
Counsel for Defendant

[Certificate of Service Omitted in Printing]

EXCERPTS FROM TRANSCRIPT IN THE FIFTH JUDICIAL CIRCUIT COURT, CITRUS COUNTY, FLORIDA

* * * *

[16] THE COURT: All right. At this time we will be in recess for ten minutes. At the conclusion of the ten minutes I would like to have all of you back in the courtroom and we will be ready to proceed with the selection of the jury.

JUROR: Beg your pardon, sir. She was talking and I didn't hear what you said.

THE COURT: If you are on the jury, you won't be sitting out there and I believe you can hear better.

All right. Be in recess for ten minutes.

(There was a brief recess and the following took place in Judge's chambers.)

THE COURT: All right. We are here to hear a motion. The State and the defendant represented by counsel, the defendant is present in person. We are to hear a motion by the defendant to limit the State Attorney of his voir dire examination, arguing the Willie Spoon case.

All right, sir, I am not inclined to grant it. I will be glad to listen to you on it.

MR. MALONEY: Your Honor, I do not wish to argue very longly. The Court held in the Willie Spoon case the prosecutor could not ask these type of [17] questions. In Florida we now have biforcated trial. The first part of the trial is used only to determine the question of facts, whether or not this individual committed a capital crime.

THE COURT: Yes, sir.

MR. MALONEY: I think that a question regarding how the jury would be disposed to punishment in the event they found a verdict of guilty would be irrelevant and immaterial to that trial and to their determination of the question of fact, whether or not he did it. And all we are asking is that such questions first not be asked

by either parties, and if, in fact, the Court is going to allow the questions to be asked, that a response in the negative they would not impose the death penalty not constitute a challenge for cause.

THE COURT: No, sir, if, at the conclusion of the trial, the jury should return a verdict of guilty of murder in the first degree, which is a capital offense, the same jury would serve as the jury in the second half of the biforcated trial and there will not be a reselection of a jury. At this time on voir dire [18] it is necessary to ask questions of this jury including their attitude on such things and it's got to be now.

Under the Florida capital punishment law there are certain conditions set up under which the proper penalty is the death penalty. In a prospective jury—It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, *it would* be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause.

You made your motion and your objection and the motion will be denied. You will, of course, be allowed at the time of the voir dire examination to raise your namely objection, but would indicate the ruling at this time. I am not cutting you off from objecting when we get to that [19] specific question. Generally, that will be my ruling. I won't cut them off from inquiring in the general area; the specific questions they ask may be objectionable, I don't know.

MR. MALONEY: If I raise the objection, which I would, will the Court make it a continuing objection?

THE COURT: Yes, sir.

MR. McDANIEL: Is the Court saying it is going to be a continuing objection from here on out?

THE COURT: Continuing objection to that particular line of questions.

MR. McDANIEL: I take it your objection right now is continuing from here on out?

THE COURT: Yes, sir, to the whole general line of questions. Still I am not telling you I will deny your objection on some specific question for some other reason you feel it has gone too far.

MR. MALONEY: Yes, sir.

(The Court, the attorneys, the defendant, the Clerk, and the court reporter returned to the courtroom.)

* * * *

EXCERPTS FROM VOIR DIRE IN THE FIFTH JUDICIAL CIRCUIT COURT, CITRUS COUNTY, FLORIDA

* * * *

Now at the time of the submission of the case, should that time ever arrive, you will be instructed by me on the law as to what matters you should consider and what you should not consider and how you should go about in arriving at your advisory sentence. Under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating then it would be proper under the law your correct verdict would be to recommend the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?

MR. MALONEY: Your Honor, pursuant to the motion I filed beforehand I object to this question. * * *

* * * *

[57] The testimony is going to show I think very shortly when the trial starts the victims in this case were white and, of course, Mr. Darden, the defendant, is black. Can each of you tell me that you can try Mr. Darden as if he was white? The fact that he is black you will not allow that to enter into your judgment whatsoever?

* * * *

[115] * * * Can you assure me—the last four jurors I am speaking to primarily—can you look at this defendant and assure me that you can try him as if he is white? Because the victims will be white. Can you look at the defendant and even though he is black can you try him

as if he was white? The same standards require the same proof. Mr. Parker?

MR. PARKER: I could.

* * * *

[165] CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

* * * *

CLOSING ARGUMENT OF THE PROSECUTION IN THE FIFTH JUDICIAL CIRCUIT COURT CITRUS COUNTY, FLORIDA

[738] THE COURT: All right, Mr. White, do you have an announcement, or argument, either one.

MR. WHITE: May it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. WHITE: Ladies and gentlemen, on behalf of Mr. McDaniel and myself, I want to thank you for your attention in this case. As Mr. Maloney stated, our job is about over. The evidence indicates one thing especially. That man sitting right over there is a murderer and I don't care what the Sheriff's Department didn't do, Mrs. Turman was on the stand and Mrs. Turman pointed to him and said, "That man murdered my husband."

Phillip Arnold was on that stand. Phillip Arnold points to him, "That's the man that shot me in the face." You don't need fingerprints for them to say them. You don't need tire tracks for them to say that.

Ladies and gentlemen, the Sheriff's Department of Polk County is not on trial today. Willie Jasper Darden is. Let's go through the evidence.

Mrs. Turman, Mrs. Helen Turman. Her [739] husband, Mr. Turman, they run Carl's Furniture Store at 3730 New Tampa Highway. They don't any more. Mr. Turman is in the cemetery somewhere with a hole in his head, and Mrs. Turman shut the door, getting ready to close the store. Her husband was out with the dogs. Willie Jasper Darden walked in. She's with him 10 to 15 minutes.

The first part, she is treating him as any customer. The second part, she's scared to death of him. Ladies and gentlemen, somebody shot and killed your spouse in your presence, would you forget that person's face? Or would that face go with you to your grave?

I'm not talking about fingerprints, I'm not talking about tire tracks, I am talking about Mrs. Turman sitting on the stand and Mr. Goodwill cross-examining her

for a half hour and not once did she waver and not once did she say maybe that's not the man, not once did she say maybe I am wrong. Every time, I am positive that's the man, no doubt.

Mr. Maloney forget to mention that [740] to you. He forgot to tell you that Mrs. Turman has no doubt. He forgot to tell you that Phillip Arnold has no doubt.

Ladies and gentlemen, if those two don't have any doubt, why should you? Mrs. Turman saw her husband shot. A charge of murder, the first element. The State has to prove to you is that a man is dead. The doctor told you that he was dead. The doctor took the bullet out of his brain, and you passed that bullet among yourselves, and said that bullet was the cause of death, no doubt a man is dead. There is no doubt that man is Mrs. Turman's husband.

And the next element that killing, that murder has to be unlawful. It has to be from a premeditated design. Listen carefully. When the Court instructs you on the law of what premeditation is, there is no time minimum on it. You don't have to think about killing somebody for three minutes before you have the premeditated design. What it means is that you have the fixed, formed intent in your mind to kill somebody.

Mrs. Turman testified Willie Darden [741] had her by the shoulder, had a gun in her back. Her husband came in the door and she said, "No, Jim, no"; that gun came from her back, went over her shoulder, and the bullet was discharged between his eyes.

Ladies and gentleman, when Willie Darden took that gun from her back and lifted it and pointed it and fired it, what did he intend to do? What did he intend to do—he intended to kill whoever came in that door. He didn't know who Jim was. It could have been you, it could have been anybody. Whoever walked in that door at that time was a dead man as far as that man sitting over there is concerned.

You cannot deny Mr. Turman's testimony. After Mrs. Turman was Mrs. Hill. Mrs. Hill heard four shots. Mrs.

Hill saw the greenish colored car go away with a black male in it.

Al Brady, who was at the scene of the accident said it was a greenish-gold car. Both of them said late model Chevrolet. The accident was a little more than three miles down the road, just a few minutes later. [742] It was the same car. Mr. Stone testified that he saw this man sitting before you today pulling up his zipper, buckling his pants. Mrs. Turman told you that that same man unbuckled his pants and pulled down his zipper a few minutes before. She didn't see him pull it back up. Is that a coincidence, that both could identify the same man? That one could see him pulling down his zipper and a few minutes later, one could see him pulling it back up? It's not coincidence. It's the same man both times.

Mr. Maloney admitted to you Mr. Darden was in the accident. Mr. Maloney admitted to you that this was a heinous crime. Mr. Maloney admitted to you that Mrs. Turman was robbed, that Mr. Turman was murdered, Phillip Arnold was assaulted by somebody with intent to murder him.

Let's to to that third count in your indictment, assault with intent to murder. That means when somebody assaults you and in their mind they mean to kill you. Somebody puts a gun in your face and fires it, what [743] do they mean to do? Joke around with you? Miss? They mean to kill you.

While we're on that, what can they tell you that would wipe away Phillip Arnold pointing to the man with no doubt in his mind? Now, they're going to tell you he was mistaken, he was under pressure.

Ladies and gentleman, if somebody put a gun in my face and fired, he wouldn't have to shoot again. I would be dead then of a heart attack, especially when I wasn't expecting it. What did that 16-year-old boy do? He tried to get up. He was shot in the mouth. He was shot in the throat, he was shot in the side, in his back. And he

kept running. That was acting under pressure. That was cool under pressure.

Now, are they going to tell you that somebody that keeps his head under such extreme circumstances was in that state of mind that he could not identify the man? He could, and he did, more than once, in this courtroom before you today.

Rather than talking about what the State doesn't have, you ought to look at [744] what the State has. Look at the testimony. Dr. Mezger, the man is dead: this bullet killed him. Mr. Cunningham, I examined the rifling, the right twist, this bullet could have come from this gun.

Mr. Maloney told you there were thousands of those guns. Mr. Cunningham told you it was a collector's item.

Then we get to the last State witness, Dan Weatherford. Mr. Weatherford found that gun 39 feet from the accident the next day. This is how he found it. This is the fired pin, looking at it right now. You are at the actual handle of the gun, I am the barrel right here. This is what you're looking at. This is how he found it.

Let's see how we can make it be that way. If this is the one, if this is the shot right here that was under the hammer when this whole episode started; fired, Mr. Turman's brain, empty chamber; a click, and Phillip Arnold's face, fired, right into Phillip Arnold's mouth; fired, right into Phillip Arnold's throat; fired, right into Phillip Arnold's back. When that would happen, it [745] would look just like that.

You remember Mr. McDaniel had Dan Weatherford set that gun with the live remaining shell under the hammer and remember, he had him fire five times. Remember, Mr. Weatherford opened up that gun and it looks just how he found it, one shot into Mr. Turman, one click, three shots into Phillip Arnold.

Ladies and gentlemen, the State proved to you that that gun was found 39 feet from that accident. The

State would not put a witness on that saw Willie Darden throw that gun there. That's because only one man can testify to that, Willie Darden. He didn't. Nobody ever thought for a second he would.

You have got murder, you have got premeditated intent, you have got a dead body that you have to account for. You have got two people who pointed to him, no doubt whatsoever, and said that man right over there sitting beside Mr. Maloney is a murderer. And it's not hard to believe, because when something serious, when something tragic happens to you, you remember it, it [746] goes with you to your grave.

You have got robbery, you have got money in a cash register that belongs to that store, that was in the custody of Mrs. Turman that this man over here yanked out after he had a gun; necessary element of robbery is when you take something. It is robbery if you take it with force or threat of force.

Would each of you, if you had money in your custody and the man comes up to you with the gun and says if you cooperate, you won't get in trouble, or something to that effect. Would you give him the money? You're durn right you would, because he threatened you, to use force. He had the gun in his hand plain and visible.

You have assault with intent to commit murder. Had that Arnold boy died, that would be murder. Of everybody you have seen today and seen throughout this trial, I would wager anybody who has been in this room this whole day, the luckiest person is Phillip Arnold. Willie Jasper Darden probably wishes he were dead, that would be one less eyewitness. That's why Phillip [747] Arnold was shot at anyway. Phillip Arnold fooled Darden, he lived. He walked into Court and he pointed at him.

Ladies and gentlemen, that's eyewitness. You have heard Mr. Maloney stand before you and tell you how good fingerprint testimony is, how good tire tracks are. Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness.

Mrs. Turman had nothing to gain by pointing to Willie Darden. She had already lost everything she had in the world, her husband. She doesn't have another one to lose, no need to point at a man that didn't do it.

Phillip Arnold has nothing to gain by pointing to a man that didn't do it. He is already carrying a bullet inside him today. If he points to the wrong man, that bullet won't leave him, it will stay there. In fact, there is only one man, only one witness that testified before you today that has anything to gain or lose by what he says, is Willie Darden. Everybody else [748] had no reason to lie.

I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

[749] MR. McDANIEL:, Ladies and gentlemen, I want to thank you for a week, I want to thank you for your time. I assure you that it was necessary under the circumstances, to use your time opposed to a week of our time. I want to assure you of something else. I'm not emotionally involved with Mr. Darden, Mrs. Turman, and Mr. Arnold. I have no animosities for Mr. Darden except that he committed this crime or these crimes.

Now Mr. Maloney and I am positive, and I assure you and I guarantee you that Mr. Goodwill will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago.

But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the [750] division of corrections turned him

loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

Mr. Darden said, oh, I don't know, no, I can't know, it's all right to drink, it's all right to drink alcoholic beverages, except the last. Remember one comment he made? Unless, well, as long as they don't find out. Find out? He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.

This man admitted that he is a prisoner, that he had a gun in his possession. He doesn't work, he is in the pool halls, he is in the bars, he is in the lounges. He is a prisoner, supposed to have been. He is not a prisoner. No, I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible [751] for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth, I wish that he had been the one shot in the neck, instead of the boy.

Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family, to visit his family, that turns out his family is a girl friend in Tampa, his family is in, I think he called her his sponsor, his sponsor.

This sponsor, otherwise his girl friend, knew that he was a criminal—prisoner, I'm sorry, prisoner; knew, let him bring the gun into her house while he was on week-end furloughs.

MR. GOODWILL: Now, I object. There's been no testimony of this.

MR. McDANIEL: I'm sorry, I believe Mr. Darden testified to it.

MR. GOODWILL: I don't believe so.

THE COURT: The Jury are the judges of the evidence. As I told you before, ladies and [752] gentlemen,

you are the sole judges. Your memory of the evidence is what counts. Proceed, sir.

MR. McDANIEL: I believe Mr. Darden testified at first it was his house. He went by to see his property. His property? He is a prisoner. He is supposed to be. Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it.

Some of the remarks I heard in the opening argument by Mr. Maloney that I want to remember I disagree with, with his interpretation of the law. You take the law from the Judge. He said that we are asking you to kill this man on this evidence.

Well, he is wrong, of course. I think he knows he is wrong. The Court will tell you at the end of the argument in the Jury instructions at this point, you are merely to determine his innocence or guilt, nothing else, whether he is guilty or innocent. And after you return that verdict of guilty of first degree murder, robbery, and assault [753] with intent to commit murder, the Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.

That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that. But I am sure that I want you to remember Mr. Maloney's opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I will ask for the death. There is no question about it.

The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now,

because the people that turned him loose—[754] this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend.

On voir dire, some people call it voir dire, I could care less, it's selecting the members of the Jury, Mr. Maloney said, and I wrote it down verbatim, the State's case is based entirely—he used the word entirely—upon two eyewitnesses.

But now, all of a sudden, when the gun comes in, I didn't hear the word entirely from Mr. Maloney. Well, I'm going to talk about the gun in a few minutes. The Court told you originally this morning the Defense attorneys would have an opportunity to make opening argument and Mr. White and myself would split our argument, which we're doing now. Mr. Goodwill will then come back and rebut everything I say. I cannot come back [755] and say anything against what he says. I cannot rebut. I cannot rebut his argument. I cannot anticipate, but he will say everything possible.

I depend on each of you to do for me what I can't do. Mr. Maloney said, well, sure he had the accident, because they have all kinds of—the State has all kinds—I hate to use the word fancy fingerprints to prove it, but do you think he would admit that accident if he wouldn't have had that fancy fingerprint to prove it? No, he wouldn't have admitted nothing.

I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.

What does he have to lose to lie? Nothing. Nothing. The only person who took that stand, Mr. Maloney said

no one took that stand and lied under oath. He [756] was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time.

Mrs. Turman was on that stand the entire morning. A good part of it was cross-examination. The Defense attorneys, which I am proud to say that I was about seven years, attempted to break, get her to say well, maybe. No, well, yes, that's him, but. He kept after her for an hour and a half at my recollection, or an hour and 45 minutes to waver. Not once, not one time did that woman waver. Not one moment did she ever imply that she wasn't absolutely, totally, and completely positive. That is the man that murdered the husband, and as Mr. Maloney said, shot the boy in the face twice, in the back —excuse me, the back side, the back, once.

And I will say at this point, maybe out of line, out of order, but neither did the Arnold boy. Neither did the Arnold boy, testify absolutely, positive, direct, didn't waver for one moment under any questioning at any time and as Mr. White said, he was under pressure. Oh, my goodness, how can [757] you remember these things? He was under pressure. He remembers the gun in his face. Mrs. Turman—I don't know how they're going to get around this. I'm sure they will bring up something. Mrs. Turman was under pressure at one point, a great deal of pressure at one point.

But the first time that Darden was in there, she wasn't under that pressure. He went in the store, all the way to the back door with Mrs. Turman, and her husband was outside. And when Mrs. Turman—he circled the entire store for the sole purpose of making sure no one else was in the building and had Mr. Turman not come through that back door, Mrs. Turman would not have been on the stand yesterday.

Do you have any doubts about that? Did he buy anything? No. Did he circle the entire store to make sure no one else was there? She wasn't under pressure then. She was under pressure a few minutes later. When he

said he would be back or his wife would be back, and she turned back to her desk, walked back to her desk and then somebody [758] closed the west door of the building that she couldn't see from her seat at her desk. And then Darden comes back. With this—this lady, robbed her. Well, robbery is a horrible offense, but if he had just taken the money and got out, fine. But he didn't do that.

So, he is not only a robber, in his lust and in his greed, not just robbery for profit. If he had just robbed that poor lady and walked out, gotten in his car and went back to his girl friend's house and then went home Monday to the prison, that's one thing.

But then, in his greed and in his lust, gets to him. He takes the woman to the back where he had already been and as she said to the room by the back door—started back there, I'm sorry, where some mattresses were. We found out later why.

Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but [759] he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more.

Now the robbery is over and now the murder is over, still not enough. All right, Mrs. Turman—Mr. Turman lying half in the building, I am sorry, mostly on the ground with one foot, I believe was in the building, and he slammed the door on the foot in the door and even at that point, four or five feet away, remember her testimony that he unzipped his pants, takes it out and tells the poor woman sitting on the floor to take her teeth out. I wish someone had walked in the back door and blown his head off at that point.

But he is lucky, the public unlucky, people are unlucky, it didn't happen. Mrs. Turman saved herself by

praying of a crime by refusing because her husband was already lying with the bullet in his forehead between his eyes. [760] She knew, or should have known it was murder on the spot. She refused, none of these facts are denied, she refused. She begged and she pleaded, sitting on the floor, looking up at that, that in his hand. Then Darden said something, got back to the cash register, with Mrs. Turman's testimony, was a few feet back in the hallway directly in line with the back door. These photographs you will have to take back in the Jury room with you, if you like, and again the gun.

Mud on the ground, outside the back door. The cash register, got back I believe in this area and the boy came in. I got the impression from Mr. Maloney that we ought to try Mr. Arnold. Why did you sent that 16-year-old boy over there? Well, I'm not going to try Mr. Arnold for sending Mr. Arnold, the senior Mr. Arnold. We are not trying that. The boy in an act or mercy, attempting to assist the man, and Darden—the boy asked for some help to get the man's head and body in out of the rain.

He asked for some help, and Darden said, "Sure, man, I will help you, sure I'll [761] help you." The boy looks back up. He reaches down to, I think he used the words squatted back down to Mr. Turman, and he looks back up and he has a gun in his hand, in his face, in his face. I believe the boy said two feet away.

And click, the trigger. Remember the click. I will explain it later. Right in his face, cold-blooded, calculating murder. I can't use any worse words than murder. I can think of some, but I can't use them.

Then he pulls the trigger and shoots a 16-year-old boy in the mouth from two feet away. What saved the boy? The only thing I know is, into the mouth, the boy is kneeling down and didn't have a direct angle to the brain or the back of the spine, but the boy is still moving, and Darden doesn't like people who move after he shoots them in the mouth.

So he shoots him in the neck. But, my gosh, the boy is still moving. Again the angle of the bullet, because he is

standing up looking down at the boy. In the neck, Darden got unlucky for a change. Finally, [762] Darden is losing his luck. The bullet didn't go in the spine. It lodges in the neck. The boy is still moving, and the boy runs and Darden takes aim and fires again into the side or back, whatever you want to call it. But Darden's luck again, he loses again and hits the ribs and comes back out the shoulder.

Up to this point, the boy had run down the road, but with it in the mouth, the side, the neck, with blood. Darden can't go back after Mrs. Turman this time because the boy then has gone out. He has lost the body this time, he is on the run. He can get help. He may not be able to talk with his two .38's in the mouth and what Darden thought was one in his back, but Darden then went to his car and left.

Mr. Goodwill said, in one of his examinations, I believe of Mrs. Hill—

(Discussion off the record.)

MR. McDANIEL: Mr. Goodwill said Mrs. Hill, isn't it possible—I believe this was Mr. Maloney—you remember, not me. Isn't it possible that this car that you saw coming [763] in the driveway was merely turning around, had been coming from Tampa and was turning around and going back? Did you see anyone get in that car? No, sir, it was moving when I saw it. The colored male or a dark-skinned white man, that's exactly what she said.

But Mr. Maloney, isn't it possible, isn't is possible that he was merely turning around? What difference does it make if he claims he didn't do it? That was one of the few times that Mr. Darden didn't break down on his trip from Tampa. That's one of the few times he didn't have car trouble, was in front of the Turman's residence. What difference does it make whether the car was turning around, turning upside down or what, if he wasn't doing it.

In fact, let's not forget one thing. Mr. Maloney says there is no question, Mr. Darden had that accident? Mr. Darden was just returning from taking a friend home, going back to his home—that was home from prison, he was going back home to his girl friend. Let's not forget only one person in this courtroom these past, only one witness this [764] past five days has been able to hear every word spoken from that stand before he took the stand, which is a right the other witnesses did not have.

Mrs. Turman and Mr. Arnold took the stand without being able to hear each other's testimony and they both testified under oath they had not talked about the crime since it happened. Are they liars? But he heard every word everybody said, and I assure you, if we hadn't been able to prove the accident, they would never have admitted it.

But the fingerprints, they have always got the answer. We had the eyewitness. Oh, the eyewitness was no good. You have got to have that fingerprint. If you have fingerprints, oh, no, you've got to have—that's just circumstantial, you have got to have that eyewitness.

No matter what you have got, you have got to have something else. What you have is no good, and that's what he's going to tell you.

There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough [765] Sheriff's Office, but he and his keepers, the Division of Corrections.

Ladies and gentlemen, last Tuesday morning, I made an opening statement to you. I have no contact with this crime except from the prosecution. But sometimes, it emotionally gets to me. For four days I have saw that man sitting there—calm, cool, calculating, collected, with his arms closed, smiling at the right time, until it came up time for his parole was in question, and then he goes to the stand with his handkerchief in his hand, ready to use it when Mr. Goodwill pops the right question about the parole. And then we cry.

I don't cry for him, I cry for the one who is dead. I cry for what happened on September the 8th, not for him.

I ask him, did you cry when Mrs. Turman was testifying about the brains running out of her husband's head? No, sir. Did you cry when the boy testified about the bullet in his mouth, did you cry when you talked about your running and chasing and shooting him in the back? No, sir. He cried only when it served his [766] purpose, when he is hurt. It may not have been only his parole. I wonder, I just wonder if he hadn't been caught in this particular crime, if he hadn't had that accident 3.4 miles away from this murder, he would still be in the public on his furloughs, visiting his family, shooting his pool, selling his gun, drinking his whiskey.

He's even got a driver's license. Why in the world does—what in the world is a State prisoner doing with a driver's license? I wonder if the public is paying for it.

Remember the Jury instructions, listen to them very carefully, please. Listen to what the Court tells you about the credibility of a witness, what you can use, what guidelines you use to test the credibility of a witness. And I'm not going to read them all to you, I'm just going to read a couple little things about the credibility of a witness.

I want you to apply it to every State witness. Impeachment, the second page after credibility of the witness, as you will [767] hear the Court say: A witness may be discredited, the weight of his testimony may be weakened or destroyed by proof of (1) that the witness may at another time made a statement which was inconsistent with his present testimony. All these other witnesses made statements in the past. Mr. Goodwill sat there very faithfully going through it. You couldn't hear Mr. Darden until yesterday, after he heard all of the other witnesses.

(2) that the witness has been convicted of a crime. He admits that, doesn't know how many times. He is on furlough and don't know how many times he's been convicted of a crime. He tells Mr. Goodwill three or four

and he tells me four or five. He doesn't even know. What is it?

There are a couple of other things the statement of a witness is inconsistent with the testimony of other witnesses or established facts. Apply that to Darden. They always use the argument of circumstantial evidence. That's no good. Mr. Maloney said we only had eyewitnesses. Let's wait until we get to the gun in a minute. Circumstantial [768] evidence. If you have a 10-year-old boy and he is locked in a room at your home, and no windows and no doors, and he is in there alone, locked from the outside, and you go in the room and he is sitting on the side of the bed, the only person in the room, and there's a cigarette burning in the ashtray, smoke pouring from it, down halfway, and you say "Have you been smoking?" And he says, "Oh, no," what do you do? You believe him?

What Mr. Maloney and that says, Mr. Darden, I am going to ask you the same thing. Don't compromise your verdict, please. Do not compromise your verdict. It must be unanimous. Twelve of you must agree. The man is either guilty or not guilty. I'm asking the same thing the Defense has—don't compromise. You will get an instruction on alibi. Listen to it very carefully and remember Mr. Darden's testimony. He had been to Lakeland, didn't know where Auburndale was, but Dakota Avenue, Lakeland Hills Boulevard, left someplace at five minutes to one, got home at 17 minutes to seven. [769] I couldn't even tell you right now what day I put a witness on the stand this week. If I thought about it, maybe I could remember, basically, Mrs. Turman, Phillip Arnold, Mr. Weatherford, 17 minutes to seven, five minutes to one. Are you going to drive in five minutes from the north part of T pa to the south part of Tampa? Why even make the trip?

All of that time he had to be back in Tampa at six o'clock for the little wedding. He didn't even bother calling anybody and telling them he wasn't going to be there.

He had to be there, he had to be there, but he didn't even bother calling anybody telling them he wouldn't be there. So I assume they didn't get married or the poor guy she married didn't have a best man. He never called. He never called, remember? I asked him. He never called from Lakeland, Polk County, Hillsborough County, Tampa. When he came home he didn't call, nobody called.

He said no one called on his behalf. Lie detector test. That's the red herring [770] they would like to throw in. I don't believe anything he says, but he said that he asked Officer Neil in Tampa, Hillsborough County Sheriff's Office to give him a lie detector test. No, I am sorry, strike that. He said Mr. Neil asked him if he would take one. He said, sure, with my counsel.

Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that.

Then he asked some jailer, he couldn't remember his name, but he could remember the name of that poor radio operator he asked to call about the wrecker. I don't know whether he asked his own attorney or not. I could care less. The Court is going to tell you later that if you have any questions about anybody's testimony, you can ask the Court to read back a portion or whatever portion of that testimony you would like to hear.

If Mr. Goodwill's memory is different from mine, ask the Court to have that testimony read back to you and the Court, I hope, will. [771] If I am misquoting anything, and Mr. Goodwill says no, that's not right, and it's important to you, ask the Court to please have it read.

Poor Mr. Darden was so unlucky, when he gets out of prison on a weekend, he just happened to be riding by in the right time, the Turman's store, he just happened to be riding by at the right moment in the Turman's store. He just happened to be riding in the same color

car, although he says it is an antique gold. The rest of the witnesses are liars. He just happened to be identified by those two witnesses, independently and separately and unequivocally. He just happened to be riding on 92 instead of I-4. He just happened to be on a two-lane road. He just happened to be riding by at this point.

He just happened to have an accident two-tenths of a mile from the county line. Now, I don't think that the defense attorney seriously are going to question—I may be wrong—but I don't think they're seriously going to question that this bullet came from this gun. Remember the circumstantial evidence. What difference does it make if [772] that's not Darden's gun? Why the hullabaloo about it? What difference does it make where the bullet comes from if this is not Darden's gun? What difference does it make what kind of gun it is if it is not his? It's his, it was his. It now belongs to the State.

All right, this is the gun. Mr. Darden's luck now goes—gets worse and worse and worse and worse. And now it just so happens he is so unlucky that he has an accident at this pole, and is just so unlucky that he has a gun found 39 feet from the post and the car is this way, 39 feet from that post and 39 feet from the edge of the pavement in a ditch. Isn't he unlucky?

All right, Mr. Weatherford testified that looking at the face of the cylinder—first, he testified that it was not buried in the mud and—take the gun back there and look at it, because does that look like a gun that was buried in the mud or buried in the water? No, it's only been in the water for that short period of time, 16 or 17 hours, long enough for the fingerprints [773] to be gone. But he happened to find this gun right there, 39 feet from his car or his girl friend's car he smashed in the post. And let's see what the chambers look like. Mr. Weatherford says he picked the gun up. He picked the gun and turned it over, checked the barrel. So any—to see if there were any live rounds in it, and then turned it back, looking from the hammer, very carefully pulled the chambers, opens it up, checks the plate.

Mr. Maloney couldn't remember how many shells are in it. Well, there were four spent shells and one live shell. This is the one we were using yesterday. Mr. Goodwill, you did not give my shells back yesterday. Do you have them?

MR. GOODWILL: I believe I did, sir. To answer your second question, no, I don't.

MR. McDANIEL: Okay. He's testified, Mr. Cunningham also testified that that cylinder turns to the left. As you fire the gun, pull the trigger, it turns to the left. I asked him to put the one marked in red—couldn't use a live one—under the hammer [774] and pull the trigger. He did. When he was through pulling it five times, five times, because Darden shot Turman between the eyes; he clicked in the boy's face, that's number two; he fired in the boy's face, is number three; he fired in the boy's neck, is number four; and he fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself.

Check the gun when you go back, please. See that it turns to the left. This is in evidence. This is the next shot coming out. The gun, Mr. Weatherford found it, the hammer was on this chamber. That's the bullet that went in the boy's back. Darden had pulled the trigger one more time, this one would have come up. This would have been next.

So, in reverse order, as you notice when the gun is on the live shell, kick this on up as it was when Darden started his shooting spree, shift this on up. When Darden fires this live shell, it moves out of the way, and the next one—this one was [775] live. That is in Turman's head. That's the bullet that went in his brain. That's the one that killed Turman, right there. That's the one that clicked in the boy's face. That's the one that shot him in the mouth. That's the one that shot him in the neck. That's the one that shot him in the back. And Mr. Darden saved one. Again, I wish he had used it on himself.

Oh, the poor guy, Mr. Darden was so unlucky at so many—he happened to be the one that was unbuckling

his pants. He was buckling his pants because of Mrs. Turman. He didn't unbuckle his pants. He testified that he took his—he hurt his chest in the accident. My God, do you unbuckle your belt to look at your chest. If you've been in an accident, do you undo them, drop your pants? All you would do is pull your belt down, pull your shirt up. He didn't go to the doctor. He didn't go to the hospital, went on to his girl friend's. He testified all this blood dripping down. I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time. [776] Not in the accident, but on the pole. But then he testified about the blood dripping. What did Stone testify to? Again, the Defense says oh, Stone must have been mistaken or is lying. Mr. Darden wouldn't lie, he wouldn't lie to save his own life.

I asked you on voir dire, would you not assume or guess about evidence, the admissibility of evidence, as decided by our Courts; when we can get evidence in, it's decided by the Court; whether Defense gets evidence in, it is decided by the Court, and not you.

I asked you this week, and you said you would abide by that. But unfortunately, there will be some red herrings out. But, please, when you hear Mr. Goodwill testify—I am sorry, arguing—please remember that I don't have a chance to rebut him, anything that he says. I have to ask you to do it for me.

Mr. Darden, his convictions, left the scene of the accident. Why? He came back. He came back after he went home and washed up. Why did he take the shirt off? Why [777] did he have the shirt in his hand? I'll tell you why. If you, on these steps down here, what is the first thing that you notice about a person? What is the first thing you see? If he has a coat on, you notice the coat. The second thing, if he doesn't have a coat on, you notice his shirt, what kind of shirt, he has on. What did it look like?

But he put the shirt back on when he got back in the car with Mrs. Simmons. He got the shirt back on. But

he went home—I am sorry, went to his girl friend's house. Then comes back, because he knows the car can be traced to him. There's a bar across the street that he had no objection of walking in the bar at 8:30 or nine o'clock to make a phone call. But he didn't do that at six o'clock or 6:05 or 6:10. He has got to go home to his girl friend's.

You can make your own assumption of why. No phone calls, no wreckers. He stopped at one service station, he says, to get a wrecker in Plant City. That's what he says. I don't know that he stopped at any. What [778] was he going to do with the wrecker when he got it? I guarantee you he was not going back to the scene of the accident until he had gotten home.

The bullet in the boy's mouth is a statement by Mr. Goodwill, I assume, why didn't it match that, that the boy had taken out the teeth and the bone and everything else, out of his mouth.

Mr. Cunningham says he is the expert. He told you that he couldn't even match four bullets that he fired from the gun himself with each other, because of the condition of the gun. Not because of any mud, but because it had been sent to England and rebored or something.

What difference does all of that junk mean? What has that got to do with a case if he didn't fire it? If it is not his gun, what difference does it make? If there's any question that this bullet from Mr. Turman's brain came from this gun, any question about Mr. Turman being dead, with a bullet in his brain; remember, Mr. Cunningham testified—remember [779] Mr. Cunningham's testimony of your own, please don't remember Mr. Goodwill's testimony about Mr. Cunningham. He said this gun, although at one time was sold to the public, that it now is becoming a collector's item, a collector's item. What difference does that make if Darden didn't do it, if it's not Darden's gun? It's his gun, and don't forget it, please.

Don't forget, please, about when Mr. Goodwill gets into five foot six and five foot eight, 185 pounds, 200 pounds, don't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.

MR. MALONEY: Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. I wish the Court would instruct Mr. McDaniel to stick with what little evidence he has.

[780] MR. McDANIEL: You don't have any evidence yourself, Mr. Maloney.

THE COURT: All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir.

MR. McDANIEL: There was a statement made by Mrs. Turman that I want to comment upon. That was, she said, Darden made the statement your husband owes me something. Mrs. Turman said she didn't know what it meant. I don't know what it means either, but I have an idea what that little statement meant.

I don't think it had anything to do with the bill, either. Mr. Goodwill is going to argue something about—let me state this: Mr. Weatherford testified that this, or Mr. Brady, that this accident—there was people milling around, numerous people around the scene of the accident, you know what I mean. People say things and do things that later no way you can find out.

Mr. Weatherford made a statement that someone said they saw Mr. Darden throwing something, the gun. Mr. Goodwill [781] will say, where is the witness? Well, I guarantee you if we had one, he would be here. But why was all the policemen out there searching that day?

Mr. Maloney, talking about Mrs. Turman's testimony under pressure, he even said one time she was under pressure at the preliminary hearing in the courtroom,

that he was the only black in the courtroom. Well, that's Mr. Maloney's testimony now, and not Mrs. Turman, that he was the only black man in the courtroom. Remember that.

But Mr. Goodwill turned to Mr. Maloney, now, after four or five months, was that man in the courtroom? That man? Yes, sir, he was. No, I don't agree with Mr. Maloney that nothing I say is important. Maybe it's not, but I hope so.

I'm going to ask you, in closing, that you consider the direct evidence, the direct evidence, and as Mr. Maloney said, it's good evidence, the best evidence, the direct evidence, the eyewitness considered as circumstantial evidence, surrounding that wreck, the time, the place, his color, clothes, [782] the gun, where he went, leaving the scene of an accident, and put them all together and don't turn this man loose. I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you.

THE COURT: All right.

MR. GOODWILL: Your Honor, I expect mine to be somewhat lengthy. I would suggest to the Court a brief recess.

THE COURT: Yes, sir, we're going to right now. At this time, the Court will be in recess for 10 minutes.

(There was a brief recess, and Court reconvened with the same appearances.)

THE COURT: All right, Mr. Goodwill, you may proceed.

IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR CITRUS COUNTY, FLORIDA

Case No. CF73-2027 C

STATE OF FLORIDA

vs

WILLIE JASPER DARDEN

FINDINGS OF FACT FOR SENTENCE

The Defendant, WILLIE JASPER DARDEN, was indicted by the Grand Jury of Polk County upon a charge of murder in the first degree. He was also charged in the same indictment with the offenses of robbery and assault with intent to commit murder at the same time and place as the charged murder. To each of the charges of this Indictment, he entered a plea of Not Guilty. After a change of venue was granted, trial was then held in Citrus County and the Defendant was found guilty of all charges by a jury of twelve persons.

The separate sentencing procedure provided by Florida Statute was then held before the trial jury. It returned an advisory sentence to the Court recommending the imposition of the death sentence. It becomes my duty to review the entire trial and sentencing procedure and enter written Findings of Fact and my conclusion from them of the proper and just sentence to be imposed under our capital felony law.

The victims of these offenses were each innocent, law abiding, decent citizens, calmly going about their every day affairs. The Defendant, at gun point, robbed Mrs.

Turman at a rural area furniture store, without resistance from her. When her husband suddenly appeared at the back door of the store, the Defendant coldly immediately and without warning, shot and killed him in the door. Mr. Turman posed no threat to the Defendant and did not even have an opportunity to flee. The Defendant then, within a few feet of her dying husband, demanded that Mrs. Turman perform an unnatural sex act upon him. A 16 year old neighbor boy arrived in innocent ignorance to help the Turmans. He was rewarded by being shot three times by the Defendant, twice in the mouth and neck while he was stooping to help the dying Mr. Turman, and once in side or back as he fled.

At the time of the offense, the Defendant was on a weekend furlough from the State Prison where he was serving a sentence.

I find this evidence to show the offenses to be shocking, cruel, bestial and without any possible justification, excuse or provocation. They show a cold, heartless and vicious disregard for human life and dignity.

Another Judge of our Court previously had the Defendant examined to determine his mental competence. He was found to be competent. Shortly before the trial, at the request of Defendant's counsel, I ordered the further examination of the Defendant by a different, private clinical psychologist and a psychiatrist to determine if the Defendant, although competent, was subject to some personality disorder or emotional problem which in some way might explain or mitigate the atrocities committed. The Doctors reported they were unable to offer any mitigating opinion or evidence. I recite this not in aggravation, but to show the absence of mitigation in this regard.

The Defense essentially consisted of a denial that the Defendant was the man who committed the crimes. In mitigation, after conviction, the Defendant again emotionally and with what appeared on its face to be sincerity, proclaimed his innocence.

The evidence was sufficient to convince the jury of the guilt of the Defendant beyond a reasonable doubt. I concur in that conclusion.

I find from the evidence and the record the following aggravating circumstances:

(1) The capital felony was committed by the Defendant, WILLIE JASPER DARDEN, while he was under sentence of imprisonment.

(2) The capital felony was committed by him while he was engaged in the commission of a robbery.

(3) The capital felony was especially heinous, atrocious and cruel.

In mitigation I find the following circumstances:

(1) The Defendant is the father of seven children.

(2) The Defendant repeatedly professed his complete innocence of the charges.

I do, therefore, conclude, find and determine that sufficient aggravating circumstances exist as enumerated above to require imposition of the death sentence and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

I find the conclusion inescapable that the law in such cases made and provided, justice, good conscience and the general welfare of the State of Florida require me to impose the death sentence.

/s/ John H. Dewell
JOHN H. DEWELL
Circuit Judge

IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

Case No. 73-2027

STATE OF FLORIDA, PLAINTIFF

vs.

WILLIE JASPER DARDEN, DEFENDANT

SENTENCING HEARING

Sentencing in the above-styled cause was held on January 23, 1974, in the courtroom, County Courthouse, Inverness, Florida, at 11:25 A.M. o'clock, before the Honorable John H. Dewell, Judge of the above-styled Court. Appearances were: C. Ray McDaniel, Esquire, Assistant State Attorney, for the State; Raymond A. Goodwill, Esquire, Assistant Public Defender; Dennis Maloney, Esquire, Assistant Public Defender, for the Defendant; the Defendant; the Court Clerk; and the official court reporter.

Thereupon the following proceedings were had and taken:

THE COURT: All right. Are we ready to proceed?

MR. McDANIEL: The State is ready.

MR. GOODWILL: The defense is ready, Your Honor.

THE COURT: All right, since the adjournment of Court Saturday night I have given considerable thought, as you might imagine, to appropriate sentence and the appropriate remarks, and I have reached the conclusion any remarks that I might have would be more for my

own benefit or for my own image than for any practical purpose so we will dispense with any remarks.

I have pending a motion for reference for a pre-sentence investigation.

MR. GOODWILL: Yes, sir.

THE COURT: Which I have also considered and really see nothing to be gained by it. And so the motion or the request for a pre-sentence investigation is denied.

So at this time, Willie Jasper Darden, if you will come forward we will proceed with sentencing.

(The defendant and attorneys approached the bench.)

THE COURT: Under the statute I am required to write and file with the Court a written statement of findings of fact upon which I base the sentence on. So I have prepared such a finding for the record.

The defendant, Willie Jasper Darden, was indicted by the Grand Jury of Polk County upon a charge of murder in the first degree. He was also charged in the same indictment with the offenses of robbery and assault with intent to commit murder at the same time and place as the charge murder. To each of the charges of this indictment he entered a plea of not guilty.

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A sixteen year old neighbor boy arrived in innocent ignorance to help the Turmans. He was rewarded by being shot three times by the defendant, twice in the mouth and neck while he was stooping to help the dying Mr. Turman, and once in side or back as he fled.

At the time of the offense, the defendant was on a weekend furlough from the state prison where he was serving a sentence.

I find this evidence to show that the offenses were shocking, cruel, bestial, and without any possible justification, excuse or provocation. They show a cold, heartless and vicious disregard for human life and dignity. Another judge of our court previously had the defendant examined to determine his mental competence. He was found to be competent.

Shortly before the trial, at the request of defendant's counsel, I ordered the further examination of the defendant by a different, private clinical psychologist and a psychiatrist to determine if the defendant, although competent, was subject to some personality disorder or emotional problem which in some way might explain or mitigate the atrocities committed. The doctors reported they were unable to offer any mitigating opinion or evidence.

I recite this not in aggravation, but to show the absence of mitigation in this regard.

The defense essentially consisted of a denial that the defendant was the man who committed the crime. In mitigation after conviction, the defendant again emo-

tionally and what appeared on his face to be sincerity, proclaimed his innocence. The evidence was sufficient to convince the jury of the guilt of the defendant beyond a reasonable doubt. I concur in that conclusion.

I find from the evidence and the record the following aggravating circumstances: one, the capital felony was committed by the defendant, Willie Jasper Darden, while he was under sentence of imprisonment; two, the capital felony was committed by him while he was engaged in the commission of a robbery; three, the capital felony was especially heinous, atrocious and cruel.

In mitigation I find the following circumstances: one, the defendant is the father of seven children; second, the defendant repeatedly professed his complete innocence of the charges, I might add consistently professed his complete innocence.

I do, therefore, conclude, find and determine that sufficient aggravating circumstances exists, as enumerated above, to require the imposition, of the death sentence, and that there are insufficient mitigating circumstances to out weigh the aggravating circumstances.

I, therefore, find the conclusion inescapable that the law in such case made and provided, justice, good conscious, and general welfare of the State of Florida require me to impose the death sentence.

Now, Willie Jasper Darden, you have, you were charged by an indictment duly found by the Grand Jury of Polk County and duly presented in the Circuit Court of Polk County with a crime of murder in the first degree, to which crime you entered a plea of not guilty. A change of venue was granted and this cause was transferred to this Court for trial. A jury of twelve citizens, duly empanelled to try you upon the charge of the indictment, having heard all of the evidence in the case, the argument of counsel, and charges and instructions of the Court, rendered a verdict against you, finding you guilty of the crime of murder in the first degree as charged in the indictment; and, upon completion of the

second or sentencing procedures of the trial, a majority of such jurors recommended that a death sentence be imposed upon you.

The Court has heretofore and does now adjudge you to be guilty of the crime of murder in the first degree, as charged in the indictment. Now, you being before the Court, attended by your counsel, do you have any cause to say why the judgment and sentence of this Court should not now be pronounced upon you?

Mr. Goodwill, I understand at this time you have motions, objections or statements to make in regard to matters in bar.

MR. GOODWILL: Yes, sir.

I would renew my motion insofar as the first degree murder definition under the Florida Statute in that it is unconstitutional, as being vague, as compared with the second degree murder statute, on the point of the felony murder rule.

I would further hold that or move the Court to hold that the entire capital punishment law which was formerly raised in our motion to dismiss the indictment renewing all of the objections which were raised in that motion to dismiss the indictment is unconstitutional. Most especially the sentencing procedure by which the jury is required to make recommendations to the Court, is likewise unconstitutional in that it is based on vague, capricious grounds, that the matters set forth in aggravation and mitigation are not based on any standards, they automatically are prejudicial against any defendant who has ever been convicted of a crime or is at the time of trial at the bar, at that time sentenced, serving a sentence in a state institution. And for these several reasons I would move the Court to hold the entire capital felony law, including the first and second degree murder definitions under the statute to be unconstitutional.

Mr. Maloney, is there any further points that should be made on that?

MR. MALONEY: No, sir, I don't believe so.

THE COURT: All right, sir. Your objections will be overruled and the motion denied.

Now, Willie Jasper Darden, do you have anything further you wish to say before sentence is actually pronounced upon you?

MR. DARDEN: Your Honor, there is very little I have to say. I still stand firm on the conviction that I am innocent. Regardless of what the penalty that you may issue until, whether it is the death penalty, whether it is life imprisonment, until my dying day I still remain innocent before you today.

I will not permit myself, Your Honor, to beg the Court on a charge in which I am entirely innocent of, even though I did the other during the course of trial at the end of trial, put myself on the mercy of the Court. But, however, sir, I still remain innocent and I don't feel that bending on my knees to you would be sufficient.

THE COURT: I am not inviting you to beg. However, I want to give you an opportunity to say anything you want to say.

MR. DARDEN: I was mostly saying, sir, that I will accept whatever penalty the Court have to enter. As a matter of fact, I have to accept it even though I still say that I am innocent and that will remain with me as long as I live.

THE COURT: The imposition of the death penalty is not a pleasant job for the Court, I can assure you.

When I came on the bench I was determined that whatever the law required me to do to perform my duties, I took an oath I would do it; so I will.

I have reviewed the matter thoroughly and completely time and again. If there was honest doubt in my mind to your guilt I would not now impose the sentence, but I cannot in all honesty say that I have that doubt.

So no legal cause being shown in bar hereof, the Court having determined that sufficient aggravating circumstances, as defined by Section 921.14 of Florida Statutes exis, and that insufficient mitigating circumstances ex-

ist to out weight them, it is the judgment of the Court and the sentence of the law that you, Willie Jasper Darden, for the crime for which you stand convicted, be delivered by the Sheriff of Citrus County, Florida, to the proper officers of the state penitentiary of Florida, and by them safely confined until such day and time as the Governor of Florida, by his warrant may appoint, at which time by said warrant directed and within the chamber provided by law, you, Willie Jasper Darden, be, by the proper officer provided by the warden of said prison, electrocuted until you are dead.

Sincerely, may God have mercy upon you.

MR. DARDEN: Thank you, Your Honor.

THE COURT: All right, you will be returned, although that orders you to be delivered by the Sheriff of Citrus County to the state penitentiary I believe you have charges pending which would require you to be in Polk County so you will be returned there for disposition of those charges. But I think the commitment will be issued in Citrus County as it is ordered and adjudged.

Do we have anything further?

MR. GOODWILL: No, sir.

THE COURT: There is one further matter, Mr. Darden. Under the statute a judgment and sentence of this type is automatically to be reviewed by the Florida Supreme Court. The statute requires it be reviewed within 60 days after the record is certified. So, Mrs. Horne, I do now direct you to forthwith proceed to transcribe the entire proceedings of the trial and the Clerk to prepare the necessary record.

I will appoint at this time the Public Defender of the Twelfth Circuit and also the Tenth Circuit for cooperative purposes since they represented you at the trial to assist you in that appeal.

If I find later that another State Attorney, say the one in Tallahassee also customarily assist in such matters I will appoint him; but at this time I would appoint, isn't it twelfth—

MR. GOODWILL: Excuse me, Your Honor, did you mean State Attorney or Public Defender?

THE COURT: Public Defender. Tenth and Twelfth.

MR. McDANIEL: Your Honor, are you going to set the value of the services of the Public Defender now?

THE COURT: Not at this time.

(Hearing concluded.)

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SUPREME COURT OF FLORIDA

Nos. 45056, 45108

WILLIE JASPER DARDEN, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

Feb. 18, 1976

Rehearing Denied April 19, 1976

Defendant was convicted before the Circuit Court, Citrus County, John H. Dewell, J., of first-degree murder, assault with intent to commit murder in first degree and robbery, and was sentenced to death, and he took direct appeal. The Supreme Court, Boyd, J., held that state attorney's remarks that defendant was an animal, that imposition of death penalty was "the only way I know that he is not going to get out on the public" and that, inter alia, "I wish [victim] had had a shotgun in his hand when he walked in the back door and blown [accused's] face off," did not deprive defendant of fair trial.

Judgments and sentences affirmed.

Sundberg, J., dissented and filed an opinion in which England, J., concurred.

OPINION

BOYD, Justice.

Pursuant to Article V, Section 3(b)(1), Florida Constitution, this Court takes jurisdiction over a direct appeal from a final judgment imposing the death penalty.

Carl's Furniture Store in Lakeland, Florida was robbed on September 8, 1973. During the course of the robbery, the proprietor, Carl Turman, was shot and killed and a neighbor boy, Phillip Arnold, was wounded. Soon afterwards, the Appellant, Willie J. Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he was driving and smashed into a telephone pole some three miles from the site of the murder, assault and robbery. After returning to his girl friend's house in Tampa that night, the Appellant was arrested on a traffic charge, leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery, and assault with intent to commit rape. The grand jury returned indictments charging first degree murder, robbery, and assault with intent to commit murder in the first degree.

Both before and during trial, Mr. Darden was identified as the guilty party by Phillip Arnold and by Mrs. Helen Turman, the decedent's wife, who was present and assaulted during the commission of the robbery and murder. The trial jury found the defendant guilty of murder in the first degree, assault with intent to commit murder in the first degree, and robbery. After the second phase of the bifurcated trial mandated by Florida Statutes Section 921.141, the jury recommended the imposition of the death penalty. After enumerating its findings of aggravating and mitigating circumstances as required by Section 921.141, the trial court sentenced the Appellant to death by electrocution.

Appellant alleges eight grounds for reversal. The racial composition of the venire, the exclusion of prospective jurors because of their expressed attitudes toward the death penalty, and the alleged unconstitutionality of the sentencing provisions of Florida Statutes Section 921.141 provide three of these grounds. Another is the court's eliciting from a state witness a comment regarding other murder cases in which Darden was, at least

initially, a suspect. The courtroom identifications of the defendant by Mrs. Turman and Phillip Arnold respectively, are alleged to be tainted by impermissibly suggestive pre-trial procedures and provide two more allegations of reversible error. A further ground is the allegedly erroneous admission into evidence of a gun asserted to have been used in the holdup and murder. Appellant's final point on appeal is that certain remarks made by assistant state attorneys during closing arguments were so prejudicial to Appellant's cause as to require the granting of a new trial.

We have reviewed all the points raised on appeal by the Appellant and conclude that only one merits consideration for reversal of the conviction below, i.e., whether statements made by the assistant state attorneys in closing argument were so inflammatory and abusive as to have deprived the Appellant of a fair trial. The law requires a new trial only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done or in which the comment is unfair.

It should be noted that the first denunciation of the criminal who committed the acts was by Appellant's own attorney, who made the following statement to the jury:

> "I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be *a vicious animal.*" (emphasis supplied)

The defense counsel was saying only that the person who committed the crimes was an animal, and he would have

had the jury find that someone other than Appellant was the perpetrator of the criminal acts. Although Appellant further complains of the expression of his personal views by the Assistant State Attorney about Appellant, the defense counsel made the following statement which showed his personal reaction:

> "But can you get the pistol back to Mr. Turman? Can you get the pistol back to Mr. Darden? No, we can't do that, but we got the pistol, and it's good enough for us. *It's not good enough for me. I wouldn't do what you're being asked to do on that, really, I* wouldn't . . . ." (emphasis supplied)

The record shows the following remarks were made in the State Attorney's portion of the closing arguments:

> ". . . *As far as I am concerned, and as [defense counsel] said as he identified this man, this person as an animal, this animal was on the public for one reason* . . . (emphasis supplied)
>
> * * * *
>
> ". . . *I am sure that I want you to remember [defense counsel's] opening statement, opening argument when he called this person an animal.* Remember that, because I will guarantee you I will ask for the death. There is no question about it. (emphasis supplied)
>
> "The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. *That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it* . . . . (emphasis supplied)
>
> * * * *
>
> "I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. *Well, let me tell you something: If I*

am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until by teeth fall out. (emphasis supplied

"What does he have to lose to lie? Nothing. Nothing . . . .

* * * *

"Mr. Turman, not knowing anything happened, not knowing what was going on. *I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun,* but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more. (emphasis supplied)

* * * *

". . . *I wish someone had walked in the back door and blown his head off at that point.*" (emphasis supplied)

In light of the "animal" characterization by the defense, when the jury found Appellant guilty, the statements of prosecuting counsel that Appellant was an animal do not seem unduly inflammatory. It seems inappropriate to reverse the State's conviction because the prosecutor was making the same alleged errors as defense counsel.[1] A careful examination of the record leads this Court to conclude that, although the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility, in this particular case they amount to harmless error when the totality of the record is considered in these uniquely vicious crimes.

Let us briefly review the conduct condemned by the prosecutor. The Appellant was a career criminal who

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[1] *Cf. Arline v. State*, 303 So.2d 37 (Fla. App. 1974).

admitted at least five convictions and who was on a weekend furlough from the state prison to visit his family when these felonies were committed. His family, including his wife, was out of the State, so Appellant stayed with another woman in Tampa. On the day of the crimes he took the woman to work and then used her car to visit various bars where he drank alcohol and gambled in a pool hall contrary to standards imposed by the conditions of the furlough, even neglecting to pick up the woman when she left work.

Appellant said he was paid to drive an unidentified stranger named Roy to Lakeland, that he had car trouble, and that he was racing back to Tampa where he was supposed to be best man in a wedding. He admitted speeding in a rainstorm and creating great danger to other motorists when he wrecked the car on the same road taken by the killer according to witnesses. The wreck was near the murder scene and occurred about the same time as the crimes; furthermore, the car Appellant drove fit the description of the getaway vehicle used by the criminal after his crimes were committed. The pistol admitted into evidence was identified as probably being the death weapon and was of the same type; it was found the day after the killing, robbery and attempted murder only thirty-nine feet from where Appellant's car was wrecked. Four cartridges had been fired, the very same number fired at the scene of the crime.

The record shows that Appellant first robbed Mrs. Helen Turman and that, when her unarmed husband Carl started to enter the store, Appellant shot him between the eyes scattering blood and brains. As a sixteen year old boy, Phillip Arnold, tried to aid the wounded man, Appellant shot him in his mouth, neck, and side, leaving permanent injuries, including a bullet still in his neck at time of trial. While her bleeding husband lay in a rainstorm at the door, Appellant tried to force Mrs. Turman to commit an unnatural sex act upon him at gun point. She

refused, and after shooting the boy Appellant left the area.

How is it possible to use language which is fair comment about these crimes without shocking the feelings of any normal person? The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair.

When the work product of a criminal is a mortally wounded husband, a wife who is sexually assaulted and robbed, and a sixteen year old boy who is shot three times while trying to help the wounded man, there is little basis to complain of the State Attorneys' expressions in reasonably describing what happened and what should be done to the guilty party.

There was overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges and a recommendation of a death sentence for first degree murder. There were absolutely no mitigating circumstances to reduce the penalty from death to life imprisonment.

While the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made, and, if there is ample basis in the record to support the remarks, a conviction will be affirmed.[2] Our review of the record convinces us that the remarks complained of were not sufficient to deprive Appellant of a fair trial when the totality of the evidence is considered.[3]

Additionally, appellant admits that his attorney voiced but a single objection to the prosecutor's closing arguments, that it was not directed to any of the allegedly

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[2] *Collins v. State*, 180 So.2d 340 (Fla. 1965).

[3] *Sanders v. State*, 241 So.2d 430 (Fla. App. 1970); *Hamrick v. State*, 235 So.2d 360 (Fla. App. 1970), *cert. den.*, 238 So.2d 421 (Fla.), *cert. den.*, 400 U.S. 994, 91 S.Ct. 466, 27 L.Ed.2d 443.

inflammatory matter, and that his attorney waited until the fifth occasion to object at all. This Court has held that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made.[4]

Accordingly, the judgments and sentences are affirmed.

It is so ordered.

ADKINS, C. J., ROBERTS and OVERTON, JJ., and FERRIS, Circuit Judge, concur.

SUNDBERG, J., dissents with an opinion, with which ENGLAND, J., concurs.

SUNDBERG, Justice (dissenting).

I dissent. Remarks made by the prosecutors during closing argument were so inflammatory and prejudicial that appellant should be afforded a new trial.

The fact that defense counsel characterized a person who would commit the offenses for which defendant was being tried as "an animal" did not excuse the prosecutor's subsequent, repeated personal descriptions of the defendant in this manner:

> ". . . But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

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[4] *State v. Jones*, 204 So.2d 515 (Fla. 1967).

> "Mr. Darden said, oh, I don't know, no, I can't know, it's all right to drink, it's all right to drink alcoholic beverages, except the last. Remember one comment he made? Unless, well, as long as they don't find out. Find out? He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.
>
> "This man admitted that he is a prisoner, that he had a gun in his possession. He doesn't work, he is in the pool halls, he is in the bars, he is in the lounges. He is a prisoner, supposed to have been. He is not a prisoner. No, I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy.
>
> "Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family, to visit his family, that turns out his family is a girl friend in Tampa, his family is in, I think he called her his sponsor, his sponsor. . . ."

Perhaps the reference to a leash, although certainly inflammatory, was excusable as being evoked by two references in argument by appellant's counsel to the crimes being "the work of an animal"; however, I find no provocation by the defense for the balance of the prosecutor's above-quoted statements.

Another area of improper comment is exemplified by the following remarks:

> ". . . The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. That's the only

> way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend. . . ."

The precise implication in this and the foregoing excerpt is that the parole authorities and the Division of Corrections are being "soft on criminals" and the jury should remedy such situation by finding the appellant guilty on the first degree murder charge. This inserts a wholly immaterial issue into the proceedings which the jury could try rather than the defendant who was on trial; however, the defendant had to be the recipient of any verdict brought back by the jury.

Nor could the remarks of defense counsel be construed to serve as an invitation for the prosecutor's inflammatory expressions of regret that appellant had not been killed during his alleged commission of the crimes:

> ". . . Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more. . . ."

After describing further conduct surrounding the commission of the crimes the prosecutor expressed once again concerning the appellant, "I wish someone had walked in the back door and blown his head off at that point." Later,

> ". . . Okay. He's testified, Mr. Cunningham also testified that that cylinder turns to the left. As you fire the gun, pull the trigger, it turns to the left. I asked him to put the one marked in red—couldn't use a live one—under the hammer and pull the trigger. He did. When he was through pulling it five times, five times, because Darden shot Turman between the eyes; he clicked in the boy's face, that's number two; he fired in the boy's face is number three; he fired in the boy's neck, is number four; and he fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself.
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> * * * *
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> ". . . And Mr. Darden saved one. Again, I wish he had used it on himself. . . ."

In asserting that the appellant had attempted to change his appearance subsequent to the date of the crimes the prosecutor concluded with the remark, "The only thing he hasn't done that I know of is cut his throat."

At this juncture counsel for appellant objected:

> ". . . Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. . . ."

Upon which the trial court ruled:

> ". . . All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir. . ."

In *Stewart v. State*, 51 So.2d 494 (Fla. 1951), Mr. Justice Terrell cautioned prosecutors to refrain from in-

flammatory and abusive argument, directing trial judges to restrain and rebuke counsel from engaging in such tactics. The reason for inhibiting such conduct was concisely stated by him in the following terms:

> ". . . Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament. . . ." (p. 495)

The implication in the remarks by the prosecutor in that case was that if the defendant were not punished by the jury he would go on to commit a more serious and heinous crime. This can be equated with the argument of the prosecutor in the case at bar wherein he implies that unless the defendant is convicted on the first degree murder charge he will be set free "on the public".

Reference by the prosecution on repeated occasions to the defendant's conduct while on furlough directed the jury's attention to matters totally immaterial to the offenses charged, and it can be concluded that the only purpose of such references was to inflame and prejudice the jury in their deliberations upon the charges at issue. In *Gluck v. State*, 62 So.2d 71 (Fla.1952), the prosecutor, in the words of Justice Mathews, "hurled epithets at the accused so foul, vile, abusive and obscene as to be unquotable in this opinion". The trial judge refused to caution and admonish the state attorney that such conduct is highly irregular, as urged by the defense. Earlier in the rape prosecution, the prosecutor had referred to the accused's unemployment, family, religion, character, and had introduced detailed evidence respecting an alleged similar act, although the accused's identity and carnal knowledge of the prosecutrix were admitted. This court reversed the conviction and granted a new trial since the prosecution at issue was not "a fair and impartial trial".

Rather than a fair commentary upon the evidence or reasonable inferences to be drawn therefrom, the above-quoted remarks by the prosecution in the case at bar can only be characterized as vituperative personal attacks upon the appellant and as appeals to passion and prejudice.

As was stated by this Court in *Collins v. State*, 180 So.2d 340 (Fla.1965):

> ". . . The rule is clear against inflammatory and abusive argument—the problem is applying the rule to the particular facts at hand. The history of the legal profession is clear also in its love of florid arguments and dramatic perorations. The line between the inflammatory and the dramatic is not clear. . ."

Here that line has been crossed. Vigorous and diligent advocacy on the part of the state is not only commendable, but necessary to make our system of jurisprudence work. The strenuous advocacy by each of the parties to a criminal proceeding of the facts and evidence which best establish their respective positions provides the basis upon which the jury may synthesize all such facts and evidence to arrive at that most desired result in our system—the truth. However, appeals to passion and prejudice distort the system and must be condemned if our system is to function and endure.

Appellee asserts that timely objection to inflammatory argument must be made to preserve the point for appellate review. There has heretofore been quoted the objection made by the appellant's counsel to the remarks by the prosecution and the court's ruling thereon. I deem this sufficient to preserve the matter on appeal since it afforded the trial court the opportunity to at least attempt to cure the effects of the remarks. It is not clear at all, however, that it was even within the power of the trial court to disabuse the minds of the jurors of the cumulative effect of the patently inflammatory remarks

of the prosecution even had it sustained the objections to the remarks and admonished the jury accordingly. The issue really is, did the appellant receive a fair trial in the atmosphere created by the prosecution's remarks. As pointed out by the court in *Wilson v. State*, 294 So.2d 327 (Fla.1974):

> "The State points out that in some instances there was an absence of objection in the present trial and in other instances an objection to the improper inferences was sustained. Such absence will not suffice where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." (pp. 328-329)

See also *Pait v. State*, 112 So.2d 380 (Fla.1959); *Oglesby v. State*, 156 Fla. 481, 23 So.2d 558 (1945); and *Knight v. State*, 316 So.2d 576 (Fla.App. 1st 1975). I conclude that the remarks set out herein were such that would unduly create, arouse and inflame the sympathy, prejudice and passions of the jury so as to effectively deprive the appellant of a fair trial. *Barnes v. State*, 58 So.2d 157 (Fla.1952).

It is appropriate to comment upon another category of remarks made by the prosecution in final argument. In expressing their personal beliefs concerning the guilt and lack of veracity of the defendant the prosecutors argued:

> ". . . I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. . . .
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> * * * *
>
> ". . . I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well, let me tell you something:

> If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.
>
> "What does he have to lose to lie? Nothing. Nothing. The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time. . . .

These statements clearly violate the letter and spirit of Section 5.8(b), American Bar Association Standards for Criminal Justice and D.R. 7-106(C)(4), Code of Professional Responsibility. Such argument has been condemned by this Court long before the adoption of the cited Standards and Code. As stated in *Tyson v. State*, 87 Fla. 392, 100 So.2d 254 (1924):

> "It is generally understood that the expression by counsel in argument before the jury of personal opinion of guilt is not only bad form, but highly improper, as counsel is not a witness, nor under oath to speak the truth, not called as an expert to give his opinion. Adams v. State, 54 Fla. 1, 45 So. 494."

To reiterate the standard of conduct expected of a representative of the State in the prosecution of a criminal trial as heretofore enunciated by several of our district courts of appeal:

> ". . . It is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. His duty is not to obtain convictions but seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client. . . ."

Knight v. State, *supra*; *Cochran v. State*, 280 So.2d 42 (Fla. App. 1st 1973); and *Kirk v. State*, 227 So.2d 40 (Fla. App. 4th 1969).

Yet the majority opinion suggests that this welter of highly prejudicial comment was fair, or if not exactly fair, then at least not so improper as to constitute reversible error "when the totality of the evidence is considered". In other words, any error underlying the conviction of the appellant must have been harmless. When one considers that Darden has been sentenced to die by the court which heard these arguments after recommendation of death by the jury to which they were made, it is evident that any assigned error should be given careful consideration before the harmless error doctrine is invoked. Obviously, resort to the doctrine in cases of capital punishment should be carefully limited.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), a California state prosecutor had commented upon defendants' failure to testify and the trial judge had charged the jury that defendants' silence could be used as the basis for adverse inferences. On appeal, the Supreme Court of California held that, while these comments at trial had denied defendants their constitutional rights, such error did not constitute a "miscarriage of justice" and was therefore harmless. The United States Supreme Court reversed the conviction, holding that in order for the denial of a federal constitutional right to be held harmless in a state criminal case, the reviewing court must be satisfied *beyond a reasonable doubt* that the error did not contribute to a defendant's conviction. The court further held that the burden of proving lack of harm rests on the State. *Id.* at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710.

Surely there is a federal constitutional right to a fair and impartial trial in the courts of this State. U.S. Const. Amends. VI, XIV. Recognizing that no defendant is entitled to a *perfect* trial, nonetheless, I am not satis-

fied that Darden's fundamental right to a *fair* trial was unharmed by the prosecution's improper commentary and believe that under the *Chapman* test this conviction cannot stand. The Florida cases cited heretofore also lead me to this conclusion.

Accordingly, I would vacate the judgment and sentence of death and remand this cause for a new trial.

ENGLAND, J., concurs.

SUPREME COURT OF THE UNITED STATES

No. 76-5382

WILLIE JASPER DARDEN, PETITIONER

v.

FLORIDA

ORDER GRANTING CERTIORARI

Nov. 1, 1976. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to Supreme Court of Florida granted.

SUPREME COURT OF THE UNITED STATES

No. 76-5382

WILLIE JASPER DARDEN, PETITIONER

v.

FLORIDA

ORDER LIMITING GRANT OF CERTIORARI

Jan. 10, 1977. Certiorari granted November 1, 1976, is limited to Question 1 presented by the petition, dealing with whether the prosecution's summation to the jury in the circumstances of this case deprived the petitioner of due process of law.

SUPREME COURT OF THE UNITED STATES

No. 76-5382

WILLIE JASPER DARDEN, PETITIONER

v.

STATE OF FLORIDA

On Writ of Certiorari to the Supreme Court of Florida

PER CURIAM OPINION DISMISSING CERTIORARI

April 19, 1977. PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissents and, adhering to his view that capital punishment is in all circumstances prohibited as cruel and unusual punishment by the Eighth and Fourteenth Amendments would set aside the death sentence imposed in this case.

SUPREME COURT OF FLORIDA

No. 56910

WILLIE JASPER DARDEN, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

May 22, 1979

Rehearing Denied July 24, 1979

Appeal from Circuit Court, Polk County;
John H. Dewell, Chief Judge

Robert Augustus Harper, Jr., Gainesville, for appellant.
Jim Smith, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM OPINION

PER CURIAM.

We have for consideration an appeal of a Florida Criminal Rule 3.850 proceeding commenced by the appellant on Friday, May 18, 1979. The appellant contends he is entitled to a new trial because of newly discovered evidence and ineffective assistance of counsel during the course of his trial. On Monday, May 21, 1979 the origi-

nal trial judge in this cause heard testimony on these contentions and denied relief.

The appellant now appeals to this Court and requests a stay of execution. We have received the record and the transcript of the trial court proceeding held on May 21, 1979. Upon a full consideration of this record we find the contentions of the appellant are without merit. The application for a stay of execution of sentence is denied and the order of the trial judge is affirmed.

It is so ordered.

ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

ENGLAND, C. J., and HATCHETT, J., dissent with an opinion.

ENGLAND, Chief Justice, and HATCHETT, Justice, dissenting.

We dissent from the Court's affirmance of the trial court's order entered on May 21, 1979, and the Court's denial of a stay pending appeal. We would grant a stay of execution for a short period of time, allow the parties to file briefs, and thereafter render a decision on an expedited basis.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 79-566 Civ.T.H.

WILLIE JASPER DARDEN, PETITIONER

vs.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections, RESPONDENT

PROCEEDINGS ON HABEAS CORPUS

BEFORE: HONORABLE PAUL GAME, JR.,
United States Magistrate

October 22, 23, 1979

* * * *

[4] THE COURT: Good morning, Counsel.

MR. PROSPECT: Good morning, Your Honor.

MR. HARPER: Good morning, Your Honor.

THE COURT: We're here in the matter of Darden vs. Wainwright, Case. No. 79-566-Civ-Tampa. I note the presence of the petitioner with counsel and counsel for the respondent.

Mr. Harper, are you ready to proceed?

MR. HARPER: I am, Your Honor.

THE COURT: And for the State, are you ready to proceed?

MR. PROSPECT: Respondent is ready to proceed, Your Honor.

THE COURT: Mr. Harper.

MR. HARPER: Your Honor, if it please the Court, may counsel approach the bench for a preliminary matter that has just come up?

THE COURT: All right, sir. You may come to the side bar.

(Proceedings at bench)

MR. HARPER: Your Honor, if it please, I ask that the Rule be invoked.

THE COURT: The Rule willbbe invoked. All those parties called as witnesses in this proceeding will remain outside until they are called.

[5] Please do not discuss the case until you've testified and these proceedings have been concluded.

Counsel, will you instruct your witnesses when they appear.

MR. HARPER: All right.

THE COURT: The Rule has been invoked.

MR. PROSPECT: If and when they appear? Or should we get them all together now?

THE COURT: Well, if they are in the hall, just make certain they don't come in without the understanding that the Rule has been invoked.

Mr. Harper, you may proceed.

MR. HARPER: Thank you, sir.

Your Honor, in the way of a preliminary statement, I will be very brief. I would ask the Court to keep in mind that we are actually talking about two trials that took place during the period of time between the 15th of January and the 19th of January, 1974, namely, a guilt trial and a penalty trial that took place under Section 921.141 of the Florida Statutes.

And in accordance with that bifurcated system and recognizing the right to due process and the importance of each of those phases, I would refer the Court to Smith vs. Estelle, which is a September [6] 13, 1979 case, 78-1839 slip opinion from the Fifth Circuit, affirming Smith

vs. Estelle, 445 Fed Supp from the Northern District of Texas in 1977.

And in part the import of the bifurcated system is to allow the jury to express its belief on behalf of the community, that the killing of the defendant is the only adequate response.

It is of vital importance to both the accused or the defendant here and the petitioner, Willie Darden and with the community that any decision to impose the sentence of death be, and appear to be, based upon reason rather than caprice and emotion.

And in that vein, we have brought to the attention of the Court what we consider under the citations we have cited in our memorandum, Jurek v. Estelle and part—or the premise of attorney misfeasance given rise to cause and prejudice in terms of the actual reason for failure to assert the federal constitutional right to trial.

We have also cited to the Court in United States vs. Uptain, 531 F2d 1281, as reference to experience and lack of experience in the way [7] the Court could or should handle a case, and Johnson v. United States, 329 F2d 605.

It is our position that in the totality of the circumstances under the Nero v. Blackburn in United States v. Gray rationale, that the counsel at the trial level and in the penalty level in the two aspects of the trial failed to duly and properly investigate and interview witnesses as denounced in the Davis v. State of Alabama, also cited in our memorandum.

Accordingly, Your Honor, we are prepared to call our first witness, Petitioner Willie Jasper Darden.

THE COURT: Mr. Darden, come forward to be sworn.

Thereupon:

WILLIE JASPER DARDEN, JR.,

a witness appearing in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARPER:

Q Mr. Darden, state your full name, please.
A Willie Jasper Darden, Jr.
Q And where do you reside?
A At the Florida State Prison, Death Row.
[8] Q And you are the petitioner in this cause?
A I am the petitioner.
Q And how long have you been residing at your current locale?
A Ever since January of 1974.
Q And that is pursuant and subsequent to the trial of State of Florida vs. Willie Jasper Darden in Citrus County.
A That is correct, sir.
Q Okay. Do you recall the date you actually were arrested in that case, Mr. Darden?
A September 8th, 1973.
Q And do you recall that date that you first met a member of the Public Defender's staff of the Tenth Judicial Circuit?
A That would be September 9th, 1973, Sunday morning.
Q Okay. Do you remember who you met that day?
A I don't know the name of the person who represented me on that first appearance hearing on that Sunday morning.
Q Okay. Do you recall the nature of the appearance?
A That is correct, I do.
[9] Q What was the nature of the appearance?
A To have the reading of the charges in which I was being held for, and to be told by the Judge the nature of the offense.
Q Did you participate in an appearance with your attorney at that time?
A I did.
Q How did you participate?

A My own participation was that I explained to the Judge that I had been falsely arrested about something I didn't do, and I asked him to—

Q Asked who?

A The Judge. If my mind—memory serves me correctly, I think I asked him, at that particular time, to place me in a lineup. That a lineup, itself, would prove that I was the wrong person who was arrested.

Q Okay. When was the next time you recall having contact with persons from the Public Defender's Office?

A On Monday, September 10th, 1973.

Q Okay. On the 9th, did you give any interview or any statement as to your involvement or lack of involvement to the offense in which you were arrested?

A I gave a statement at the first appearance hearing and also to the attorney who was representing me at that particular time.

[10] Q Okay. How was your rapport with the attorney who was representing you at that time?

A Ask that question again, please.

Q How was your rapport? How did you get along with the attorney who was representing you at that first appearance?

A Well, quite well. There wasn't any communication between us too much, because he was just there to be—to stand up with me, there at the first appearance hearing.

Q When you were first debriefed and a formal statement taken from you by a member of the Public Defender's office?

A Monday, September 10th.

Q And do you recall who that person was, who took that statement?

A I first spoke to Mr. Jerry Hill. I later that day spoke with Mr. Jack O. Johnson.

Q Mr. Johnson being the Public Defender?

A Mr. Johnson being the Public Defender, that's correct, sir.

Q Who did you meet with first that day?

A Mr. Hill.

Q What time of the day or night was that?

A That was morning, between nine and ten o'clock.

[11] Q And how was your relationship, as attorney-client, with Mr. Hill?

A Quite good, sir.

Q Okay. What was the sum and substance of that meeting with Mr. Hill?

A I went over details with him as to my activities on September 8th, concerning the time in which I left Tampa, Florida, going to Lakeland, my activities while in Lakeland, my activities while coming back from Lakeland to Tampa.

I gave him the complete details of my actions and whatever questions he asked.

Q Did you make any indication or reference to the desire to have a lineup?

A I most certainly did, sir.

Q Did you make any reference to any type of testing?

A I most certainly did.

Q What kind of test?

A Polygraph test.

Q What specifically did you make reference to in regard to a polygraph test?

A It began with the lineup. I first explained to him that I wanted a lineup because I wasn't the subject on which I was arrested.

[12] Q I'm sorry, I didn't understand you.

A I first appealed to him to request a lineup because those were the presumptions under which I was arrested. With the potentiality that I would be placed in a lineup and provided that I could not be identified by the alleged witness, that I would then be able to return home.

Q Now, you said those were presumptions or suppositions under which you were arrested. What do you mean by that? Explain that further, please.

A The arresting officer who arrested me at my home explained to me he was arresting me for this—for the

reasons that he wanted to place me in a lineup in regard to a crime in which he was investigating that particular time.

Q Namely, the Turman homicide.

A I suppose so.

Q Okay.

A He said if I could not be identified in the lineup as being the alleged assailant, that I would then be allowed to return home. So I brought it to Mr. Hill's attention first off, first thing Monday morning. I also brought it to the Judge's attention at the first appearance. And from there then I went into saying to Mr. Hill that I would be willing to take a lineup; I [13] wanted a lineup, and I would also be willing to take a polygraph test—anything that would substantiate the fact that I was innocent of all the charges which I was being accused of.

Q Did you give a list of witnesses to Mr. Hill at that first meeting?

A I did, sir.

Q Do you recall how many witnesses you identified to him?

A I mentioned to Mr. Hill in regards to my activities in Lakeland, Florida. I mentioned to him the lady to whom I had been talking to while in Lakeland, while waiting for my car to be repaired.

At that particular time I did not know her name but I did know where she lived. I also referred to two police officers who helped me push my car out of the street into the driveway of the Lawhorn Real Estate office. I also gave him the name of the two ladies whom I hired to take me to Tampa after I couldn't get a wrecker to tow my car out of the ditch.

I also referred to Ms. Macie Wright and Mr. Arthur Akins and the wrecker driver whom I hired to take me back to the scene of the accident to retrieve my car.

Q Did you identify those persons by name or [14] simply by identification?

A I only identified two persons by name. That was Mr. Arthur Akins and Ms. Macie Wright.

Q Did you later learn the names of those persons who you at that point merely identified?

A Yes, I did.

Q Do you now recall the names of those persons?

A There's Ms. Christine Bass.

Q Okay. And who is she now?

A Ms. Christine Bass is the lady with whom I had spent some time talking with while waiting for the wrecker service in Lakeland to come to repair my car.

In fact, Ms. Bass is the one who called the wrecker service for me on two different occasions that particular day.

So I explained this to Mr. Hill. ANd at that particular time I did not know her name, but I told him exactly where she lives. And I did not know the name of the two police officers who aided me in getting my car out of the street. I did not know the name of the wrecker driver, nor of the person who owned the wrecker.

Q Did you later learn those names?

A I did.

Q Okay. Do you recall the names of the two [15] police officers who helped you move your car?

A No, I really cannot.

MR. HARPER: Mark this as Defendant's Exhibit No. 1 for identification, please.

THE COURT: That should be Petitioner's Exhibit No. 1.

MR. HARPER: Yes, sir.

(Said document marked for identification as Petitioner's Exhibit 1.)

BY MR. HARPER:

Q Mr. Dardin, I show you what has now been marked as Petitioner's Exhibit No. 1 for identification and ask if you can recognize that document?

A Yes, sir, I do recognize this.

Q It appears to be handwritten. Do you recognize the handwriting?

A That's my handwriting, sir.

Q And those are notes made by you?

A That is correct.

Q Do you know when you made those notes?

A I made those notes shortly before my trial were to begin. As a matter of fact, I think it was on the same day my trial were to start.

Q What is that document there that you made notes of? Or that you originated?

[16] A This is a list of witnesses which I wanted to be subpoenaed to testify on my behalf at trial.

Q Does it contain names and addresses?

A It does.

Q And does it in any way help to refresh your memory as to the names of the witnesses you're referring to who are the police officers who helped you move your car?

A It most certainly does, sir.

Q And what are the names of the police officers who helped you move your car, as you later identified them?

A Mr. Joe Keil and Mr. Charles Tyas.

Q Okay. And these are persons that you identified, at least by occupation—

A Correct, sir.

Q —to Mr. Hill at your initial meeting.

A Correct, sir.

Q In the way of identification, who else did you identify at your initial meeting, to Mr. Hill?

A I identified Ms. Macie Wright, Mr. Arthur—Arthur James Akins, Mr. William F. Barnes—

Q Excuse me. Now, Mr. William F. Barnes—did you identify him by name?

A Not by name.

[17] Q How did you identify him?

A I identified him as being the owner of the service station from which I rented the wrecker from on the day of my arrest.

Q Okay. Go ahead with the other witnesses then.

A Mr. J. W. McCoy, I identified him as being the wrecker driver who took me back to retrieve the car. Mr. John D. Stone as the person I ran off the highway to keep from hitting him in a headon collision on the day on which my accident occurred.

Mr. Todd Stone was one of the riders in the Stone car; also, Mr. Joe Stone were a rider.

Mr. Jimmy Lawhorn, he's the person who participated and helped me repair my car while it was stalled by Ms. Christine Bass's home.

The same goes for Robert D. Lawhorn and Mr. Larry C. Lawhorn.

Ms. Christine Bass is the lady who aided me in calling the wrecker, and whom I talked with for quite a while awaiting the arrival of the wrecker.

Ms. Mary Simmons is the lady whom I hired to take me to Tampa after I had had the accident.

And Joe Keil, as I said—he was the police officer who aided me in getting my car out of the street, along with Mr. Charles Tyas.

[18] And that's it except for Mr. Jim Hill's name who is an investigator for the Public Defender's office.

Q How did you learn the correct identities and addresses of these persons that you have just named?

A Through—through my motion for—to discovery that I filed with the State Attorney's office. I received those names along with the legal materials in which they had used in pertaining to my case.

Q What was the nature of your defense in this case?

A The nature of my defense—my defense was based on innocence.

Q And in legal terms, did you have a defense known as alibi?

A I most certainly did.

MR. HARPER: I ask that this be marked as Petitioner's Exhibit No. 2.

(Said document marked for identification as Petitioner's Exhibit No. 2.

Your Honor, at this time I offer into evidence as Petitioner's Exhibit No. 2, which is notice of intention to claim alibi.

THE COURT: Any objection?

MR. PROSPECT: No objection, Your Honor. It's already a matter of record. It's already been [19] introduced into evidence.

MR. HARPER: It's part of the record, Your Honor.

THE COURT: Without objection the document identified will be admitted as Petitioner's Exhibit No. 2.

(Petitioner's Exhibit No. 2 received in evidence)

BY MR. HARPER:

Q Mr. Dardin, you indicated that you had prepared this witness list on or about the day of your trial.

A I had prepared that witness list long before then. It was on the day in which I was supposed to have been transferred that I filed my own motion with the Judge asking that these witnesses be subpoenaed.

But I had supplied that list long before that point to my attorney.

Q This particular list that we have identified as Petitioner's Exhibit 1 was prepared by you when, now?

A Somewhere around the first or second week in October.

Q And when was it actually filed?

A By the State Attorney or by myself?

Q By you.

A It was filed by me with the Court—I'm not [20] sure of the date, but it was right at the time that I was supposed to be transferred from Polk County to Citrus County for purposes of preparation of the trial.

Q Why did you cause this to be filed?

A I had many times asked my attorney to make sure that he had the witnesses subpoenaed so that they could give testimony on my behalf.

When we came down to the final stages, within a day or so of the trial, I learned that no witnesses had been subpoenaed. I spoke with Mr. Goodwill about this, who was my attorney, and he stated to me that he was not going to subpoena any witnesses. So I went back to my cell and I drew up my own list and I drew up my own motion and I filed it with the Court, asking the Court's permission to subpoena these witnesses so they could give testimony on my behalf at trial.

Q And this witness list is a part of that prayer to have those witnesses subpoenaed.

A That is correct, sir.

MR. HARPER: I would offer Exhibit 1 at this time, Your Honor.

MR. PROSPECT: Objection, Your Honor. It is not included in the pre-trial stipulation as to the number and nature of exhibits to be filed in the cause. And it hasn't been made the subject of [21] any motion to amend the stipulation in the interest of justice.

THE COURT: Objection overruled. The document identified will be admitted as Petitioner's Exhibit No. 1.

(Petitioner's Exhibit No. 1 received in evidence)

BY MR. HARPER:

Q Did you ever receive a lineup, Mr. Dardin?

A No, sir, I didn't.

Q Did you ever take a polygraph?

A No, sir, I didn't.

Q Do you recall the next time after September the 10th that you actually saw a member of the Public Defender's office of the Tenth Judicial Circuit?

A After September the 10th? It was at the Preliminary Hearing.

Q Do you recall the exact date or the approximate date of the Preliminary Hearing?

A I just—I can't quite remember the date. But it was around September 12th or 13th, somewhere along in there.

Q Do you recall who was your counsel at that hearing?

A Mr. Jerry Hill.

Q Generally, how was your relationship with the [22] members of the Public Defender's office?

A Well, between the time of my arrest and the Preliminary Hearing I only talked with about three persons from the Public Defender's office, perhaps four persons. The only two persons whom I knew by name were Mr. Hill and Mr. Johnson.

The relationship with Mr. Hill was quite good. We could talk very openly and heartly about things that involved my case.

My communication with Mr. Johnson was somewhat unbalanced. It seemed to me that I just couldn't get a point across to him or do any explaining to him without, you know, feeling somewhat distant between the relationship.

Q You said you talked to four people from the Public Defender's office. Can you identify those four people that you talked with between the time of your arrest and the Preliminary Hearing?

A I talked with Mr. Maloney, Mr. Dennis Maloney. The other persons I do not know.

Q And that was the first man you met at the first appearance?

A The one that I do not know?

Q Right.

A That is correct.

[23] Q Between the time you were arrested and the time you went to trial, do you know how many different attorneys you spoke to about your case from the Public Defender's office?

A I spoke with several of them. Everybody that works for the Public Defender's office, I'm sure.

Q Okay. Can you identify those persons?

A Mr. Jack Johnson, Mr. Jerry Neal, Mr. Dennis Maloney, Mr. Todd Goodwill and Mr. Horton. I don't know Mr. Horton's first name.

Q How are you spelling that?

A H-o-r—the last name? H-o-r-t-o-n.

I also spoke to Mr. Jim Hill who was the investigator—the investigator for the Public Defender's office.

And there was a couple more whose names I don't know—I don't remember.

Q Were different lawyers assigned to your case from the Public Defender's office?

A I think perhaps several lawyers from the Public Defender's office at one point or another represented me at some stage or another in the case, whether it was to a hearing or whatever. Whether they came to talk to me or whatever, I talked to quite a few people.

Q Okay. Were any of these attorneys—did [24] they indicate that they had been assigned to your case and taken off the case or any type of reassignment?

A The only persons who had been assigned to my case were Mr. Jerry Hill and Mr. Todd Goodwill. I assume that the others were just representatives of the Public Defender's office to fill in when there were—when one of those two persons were not available.

Q Do you know when Mr. Todd Goodwill was assigned your case?

A I can't remember the exact date but it was shortly—directly after Mr. Hill left the Public Defender's office.

Q Mr. Hill being which Mr. Hill?

A Mr. Jerry Hill.

Q That is Mr. Jerry Hill, Esquire, Attorney?

A That is correct, sir.

Q Do you know approximately what stage of the case it was in when Mr. Goodwill was assigned the case?

A I think it was after—I know it was after the Preliminary Hearing was but before I was scheduled to go for arrangement. (sic) The exact date I do not remember.

Q Did Mr. Goodwill follow your case all the way through from that point of assignment to the conclusion of the trial?

[25] A In other words, did he represent me from that point on? Supposedly, yes.

Q What do you mean, supposedly?

A Well, let's say he was the attorney of record.

Q Okay. Were there appearances where you went to Court he was not present and other counsel was there?

A Quite a few—quite a few.

Q Can you recall any of those appearances, in particular, where you went to Court and he was not present?

A Not by—not by—not by name of the nature of the appearance, I cannot remember. I do remember there was at least two or three times that other people filled in for him. But I don't know whether it was at the arrangement (sic) or whether it was just a hearing or some motion or whatever, you know, I can't remember the exact part of that.

Q Did you ever go to Court without an attorney?

A Yes. At one point when I was representing myself.

Q Okay, we'll get to that. Other than the point where you were representing yourself, did you go to Court without representation from the Public Defender's office of the Fifth Circuit?

A No, sir, not that I can recall.

[26] Q Okay. In other words, there was some lawyer there.

A There was someone there from the Public Defender's office. Whether I knew him or not, there was someone there.

Q Okay. It wasn't always necessarily Mr. Goodwill or Mr. Maloney. So that is correct.

A On many occasions it was Mr. Maloney who was there rather than Mr. Goodwill.

Q Was that when Mr. Maloney was an interne or had he been admitted to the Bar?

A He was an intern.

Q Okay. He was appearing in Court for you as an intern at some point?

A Right. Correct, sir. He was not at that time admitted to the Bar. He was still on internship during the —even throughout the trial.

Q Did you have any communication barriers or problems communicating with your counsel?

A All except Mr. Maloney and Mr. Hill.

Q Which Mr. Hill, now?

A Mr. Jerry Hill. To put it more mildly, I think my communications—my lack of communications, shall I say, was based around Mr. Goodwill and Mr. Johnson. Because those were the main two I couldn't [27] communicate to on any circumstances.

Q What was the nature of your communication difficulties with Mr. Johnson?

A Mr. Johnson—I don't know—there seemed to be some kind of forcible opinion within Mr. Johnson where he would tell me what he was going to do rather than talk to me, really communicate with me, about what is to be done, how he was going to do it and things of this nature.

I was never able to sit down and talk to him on a client relation basis.

Q Can you give something specific that you're referring to?

A Well, let's go back to September the 10th, on Monday. On this particular day I spoke with Mr. Johnson. He introduced himself as being the Chief Public Defender and he told me his office was handling my case.

I immediately asked, after his introduction to me—I immediately spoke to him about the lineup and the polygraph test and, you know, things, other things about the case I thought perhaps he would be interested in.

And he assured me on this particular day that he would request a lineup immediately, that Monday [28] afternoon or either that Tuesday morning.

Tuesday morning no one told me about the lineup, no one called me out for a lineup, so that Tuesday afternoon I wrote him a letter. He did not respond. I wrote him several letters between that time. So in the meantime I went to the Preliminary Hearing.

Some two weeks later I did see Mr. Johnson and I approached him with the question of why, you know, had he not kept his promise with me pertaining to the lineup. And at that point he became very hostile with me for questioning his integrity. I suppose he felt—he told me that he was the Public Defender, I was the client. He would handle the case the way he saw fit, and that was that.

At this time, you know, I wanted to question him further but I know that he was not in complete control of himself. I also at this time had smelled a little alcohol on his breath and I thought perhaps he was not all together, you know, and I didn't want to cause a confrontation. So I just dropped the subject, you know—just let it go at that.

Of course, I felt pretty angry about it on the inside.

Q Do you know when that was?

[29] A This was after the Preliminary Hearing when I—when I approached him about this.

Q Did you have any other confrontations of sorts with Mr. Johnson?

A Well, practically every time I met with Mr. Johnson there was some kind of confrontation.

Q I need you to be as specific as you can as to incidents, please. Tell me the next one after this one.

A Well, one confrontation I had with him is that when he tried to get me to plead guilty. At this point he had became very—very hostile feeling existed between us because of this.

He explained to—excuse me—he explained to me that he could get a deal with the State for a life sentence providing I pleaded guilty.

I became quite disturbed about him asking me to do this.

Q What were the precise terms of the plea agreement, as best you can recall?

MR. PROSPECT: Your Honor, I object. I realize before we got to the hearing that all three of us, the Court and counsel and I, agreed that we have very general charges here and while that's true, it nevertheless is also true that [30] we're getting into specific allegations now that have not been brought up in any of the pleadings or pre-trial stipulation as to issue identification.

I don't see where this fits, and I think the entire line of questioning is irrelevant to the issues as framed in the stipulation.

THE COURT: I'm going to overrule the objection and permit him to answer the question. If it becomes necessary by virtue of some surprise, we'll consider a continuance in order that you may meet the testimony presented.

MR. PROSPECT: Thank you, Your Honor.

THE COURT: You can answer the question, Mr. Darden.

A He explained to me that he could get a package deal for a life sentence for me in return for my guilty plea.

This disturbed me to the point because I had been constantly begging him to do something to help preserve my innocence. I was caught by surprise when he came at me from this angle because all the while he was leading me on to believe he could do whatever was necessary to prove my innocence; and, all of a sudden, he came to me about some guilty plea.

[31] We had some cross words about it, and I got up and walked away from him. And I said at that time—I told him I didn't never want him to approach me in that manner again, because I would never plead guilty to anything that I didn't do.

A few days later he sent Mr. Horton to talk with me, and Mr. Horton is a person who's known by many inmates as "Copout Horton." He's supposed to be known, especially in getting inmates to cop out. And this was directly after a hearing on one of the motions, that he approached me about this.

I also had a confrontation with him about it. And that on two occasions Mr. Todd Goodwill approached me about this.

And I think from that point on ill feeling between us became very bad, you know—we couldn't communicate on anything without getting hostile.

Q Did you have any other incidents, first with Mr. Johnson, in problems with communication?

A The first incident I had with him—the first problem I had with him was when I asked why he didn't keep his promise and obtain a lineup for me. Except for that particular time and when I also had one with him about the plea bargaining deal he tried to get me to accept—I think those were perhaps about the only [32] two times because I really didn't see Mr. Johnson that much.

Q Okay. Did you file any motions or court orders regarding your problems with Mr. Johnson?

A Yes, I did.

Q What did you file?

A My first motion was to dismiss counsel. And asked at that same time—asked the Court to appoint counsel other than the Public Defender—same of which was denied.

Q And you say that was your first motion?

A That was the first motion to dismiss counsel.

Q Did you have a subsequent motion?

A I later, at a later date, filed another motion that was—this first motion came before they tried to get me to accept the plea bargain deal.

The second motion came after they tried to get me to accept the plea bargain deal. This was when I filed

another motion and asked the Court to—I told the Court I wanted to get rid of Mr. Goodwill and the Public Defender's office period. That I would take a chance on representing myself rather than—if the Court didn't want to appoint other counsel.

MR. HARPER: These need to be marked as 3, 4, and 5, please.

[33] (Petitioner's Exhibits 3, 4 and 5 marked for identification)

BY MR. HARPER:

Q Was it your problems with communications or other problems that you had which precipitated your filing these motions to discharge counsel?

A It was based on a variety of things that cropped up from the beginning stages of their representing to me to the point in which I was prepared to file the last motion to dismiss counsel.

Q What were those variety of reasons?

A It was all the—it was all the things that I have named; the lack of communication, their regard of the fact that they didn't seem to take an interest in my case.

They would file no motions that I felt was necessary to, in all, to substantiate my innocence or to protect me against the injustice that I saw building in the case.

They refused to go out and talk with any of my witnesses or take depositions from the witnesses or to do anything that I thought was necessary, in all, to build a foundation, you know, to the case that would be helpful at a later date.

Q What evidence do you have that they refused [34] to talk to witnesses?

A You mean what evidence do I have that they—

Q What indication did you have that they were not following up on the witness list?

A Well, by their own word of mouth.

Q Who is that?

A I would say Mr. Goodwill on this. I asked him several times to go out and take depositions of witnesses, you know, because this is also what led me to file my first motion for discovery.

Q Pardon—your motion for—

A My first motion for discovery, because I could not get any information from them period.

When I talked with them about my case I never got answered, directly. It was always a roundabout answer, and my questions were not answered.

So in pertaining to the investigation that I asked them to do, they refused to go ahead with the investigation that might well have proved the fact that I was innocent.

I had a slight confrontation with them in regards to my letter to the Governor, and also my letter to Governor Askew and to the Attorney General, Robert Shevin, and to the FBI Department, and copies of which I sent them. The reason for these letters came [35] out of the same situation where it was a lack of communication and the fact that they had refused to investigate my case.

And my letter to the Governor was given for filing with those issues which I asked the Governor and I asked the Attorney General and specifically the FBI Department, to please send someone down here and to investigate the case, itself, and the charges, as well as those persons responsible for those charges.

And one confrontation led to another. And when I put them all together, I saw I had no choice but to go ahead and file a motion to dismiss counsel and try to get someone to represent me and whose answers—and I had an answer in what they were learning.

Q Mr. Darden, I show you what has respectively been marked as Petitioner's 3, 4 and 5. Can you identify those documents?

A Yes, sir, I can.

Q Are those in fact the same motions you were referring to just previously in your testimony?

A That's correct, sir.

Q Are both of your motions to dismiss counsel there, or is that just one of them?

A One of them is a motion to dismiss counsel, [36] and the other one is the motion for waiver of counsel, which is the same.

Q Is that what you were referring to?

A That's correct, sir.

And this is the motion to dismiss also, but I think this motion here is the motion to dismiss the charges—I think.

Q Well, would you look at it and see?

A Yes, it is.

MR. HARPER: Your Honor, at this time I would offer Exhibits 3 and 5 into evidence.

THE COURT: He identified those for the record?

MR. HARPER: Yes, sir, Your Honor. Exhibit 3 being entitled the pro se motion on—let's see—it's entitled Motion to Dismiss Counsel, which is a pro se pleading Mr. Darden has identified.

THE COURT: Any objection?

MR. PROSPECT: No objection, Your Honor. They're already a matter of record.

MR. HARPER: And Exhibit 5 is a motion for waiver of counsel. I withhold Exhibit No. 4, identified as No. 4, at this time.

THE COURT: The exhibits Marked as Exhibit [37] 3 and Exhibit 5 will be admitted without objection.

(Petitioner's Exhibits 3 and 5 received in evidence)

BY MR. HARPER:

Q Did either of your counsel ever indicate that witnesses that you identified there in your Exhibit 1 were not going to be used or called?

A Not until they had been dismissed.

Q What do you mean by that?

A In other words, as I said before, I had to bring subpoenas on my own by filing a motion with the Judge.

Those witnesses were subpoenaed and they were at the trial all the while that the State was presenting its case.

Q Which was how many days, Mr. Darden?

A My trial lasted five days.

Q And those witnesses came to Court each and every day?

A Each and every day.

Q Did you personally observe them?

A Yes, I did.

Q And they were present?

A Yes, they were.

Q And your trial was located where?

[38] A Citrus County, Inverness, Florida.

Q Excuse me—where?

A Inverness, Florida; Citrus County.

Q Okay. And the witnesses were located where? Approximately where?

A Lakeland—they were from Lakeland, Tampa and Avon Park.

Q And how many witnesses were there on your behalf? Were all the witnesses that were listed on your witness list there?

A Except for the policeman. Mr. Barnes wasn't there. I just remembered who else weren't there. I can't recall all who there.

Q But were several there?

A Correct. Yes, sir.

Q Half a dozen? Or less? Or more?

A At least half a dozen. I know that Mr. Akins was there, Ms. Bass was there, and the Stones were there.

Q I believe there were three or four of the Stones. Were they there?

A That's correct, sir.

Q All of them?

A And the lady from Avon Park, I know she was there.

[39] Q Okay. Now, you learned at what point these witnesses were excused?

A Excuse me—there was one more person there. It was the lady that had taken me to Tampa after the accident.

Q Ms. Simmons?

A That is correct, Ms. Simmons.

Q When did you learn that they were excused or were not going to be used as witnesses?

A After the State had rested its case.

Q And was that prior or subsequent to your presenting your case in chief?

A That was prior to. In other words, I was under the impression that I would be the last one to testify.

When the State rested its case, the Court called a recess. I was taken in the holding cell, and from the holding cell I could see the witnesses sitting on the bench —on the witness bench. There was no witnesses there but I didn't pay any attention at that time because I thought perhaps they had gone to get water or something of that nature.

I did not know that they had been dismissed until about five minutes later when they took me out of the holding cell into a little room where Mr. Todd [40] Goodwill and several officers were. And that is when I was told by Mr. Goodwill that he had sent the witnesses home, and that the reason he did not want to use the witnesses was because he wanted to have last summation to the jury.

He said that the last thing the jury hears is what they best remember. This was his excuse.

Q Were these witnesses excluded or excused with your prior consent or knowledge?

A Most certainly without my consent, because I worked hard to even get them there.

Q And you didn't know that they were going to be excused?

A No, I did not.

Q And you had no prior discussion that they were

going to be excluded until, in fact, they were already gone; is that right?

A Definitely not.

Q Were you allowed to appear as co-counsel or counsel in your own right in this case?

A At trial or before trial?

Q Both, or either.

A Before trial, on a couple of occasions during which I had gotten rid of my attorney and was representing myself, I appeared in Court on my own behalf [41] to argue my own motions in which I had filed pro se. I did not participate in trial as co-counsel or whatever you might wish to call it.

Q So you had counsel, Mr. Goodwill and Mr. Maloney who actually participated as trial counsel; is that right?

A That is correct.

Q But you did not appear as pro se counsel during your trial?

A No, sir, I did not.

Q Okay. You indicated that Mr. Goodwill informed you that the witnesses would not be used. Did Mr. Maloney participate in that conversation with you?

A No, sir, Mr. Maloney was not present.

Q Who else was present?

A There was about three guards, officers that was supposedly guarding me, and some guy in plain clothes—I don't know who he were.

Q Now, you indicated that you had gotten rid—I believe you used that word—of your attorneys at some point. What caused you to feel the necessity to discharge your attorney?

A I had reached the stage where my attorneys and I could not really sit down and talk about anything. [42] My attorneys more or less forced whatever they wanted to upon me to do whatever they wanted to regardless of what I had to say about anything.

And when I did do something or ask them to do something, it was never done. They would either tell me they

were going to do it and didn't, or they would tell me outright that they weren't going to do it.

They told me—I was told that so long as they were the attorneys and I was the client, that they would do things their way; that they was appointed by the Court, and if I didn't like the way they were handling my case, that I could go to the Court and get them dismissed.

So there was a harsh attitude, seemingly, from those attorneys toward me for the largest part of their representation to me.

The only attorneys that I could really talk to were Mr. Maloney and Mr. Hill. And Mr. Maloney—there was very little conversation with him because he didn't know that much about the case. So he could not give me the answers that I wanted.

Q In the record, Volume 1, Page 28 and 29, is a petition for right to assist counsel in your own defense, signed apparently by Willie J. Darden.

[43] Do you recall filing such a motion?

A Yes, sir—yes, sir, I did.

Q And what was the reason for your filing that motion?

A My reasons for filing that particular motion is that I had difficulty in the communications with my counsel. In other words, when a hearing was held I would ask them to raise certain questions, to object to certain issues; they refused to do so.

They did not allow me to—in other words, by refusing to do what I asked them, denied me the opportunity to participate in my own defense, you know, by asking them to object to a certain issue or to raise a certain issue or whatever.

I weren't a qualified attorney, myself. I felt that perhaps if I involved myself more in my own defense, that perhaps our communications on client-attorney level would progress into a better position than it were.

MR. HARPER: Your Honor, may counsel approach the bench?

THE COURT: Yes, you may.

(Proceedings at bench)

BY MR. HARPER:

Q Mr. Darden, Page 30 and 31 of the record [44] reflects a handwritten motion for a bill of particulars apparently signed by Willie Jasper Darden, pro se. Do you recall actually filing such a motion?

A Yes, I do.

Q Did you file that pro se, yourself?

A Yes, I filed that pro se.

Q And what was the reason that you filed that motion, a bill of particulars?

A First, let me explain the bill of particulars. The bill of particulars was the same as the motion for discovery. It was using the old phrase rather than the new phrase.

Q Okay. But as far as the legal ease—you understand that—what was the factual predicate and the reasons you filed the motion you titled Motion for Bill of Particulars?

A My reasons for filing that motion is because I had on many occasions asked my attorney to sit down and to tell me what was going on in my case; what was being done, what weren't being done, what the State Attorney was doing, and what they were doing.

I was never able to get any information out of them concerning the case. They only talked about that which they wanted to talk about, but never to answer questions. In other words, to give me direct [45] answers as to what was being done.

I got to the stage where I needed to know, you know, what was being done to help Willie Darden prove his innocence, see. And when they refused to tell me these things, then I had to take the initial step to file my own motion to try to get any legal material that had been filed and also see for myself what was being done.

Q Were you shown or did you receive from the office of the Public Defender any photographic array or lineup type array in the identification procedure utilized to bring you into the case?

A No.

Q Is that why you moved for that photo array in your bill of particulars?

A I'm quite sure it were, sir. What I was doing here—I did not know they had such photographs. So what I was asking for was any and all evidence they had, tangible and intangible, signed, unsigned. In other words, I wanted to copy everything, so I used the word photo down just in case they did have photographs.

Q Okay. You did not know whether they did or did not have photographs?

A Correct. I did not know.

[46] Q You were not told?

A No, I weren't.

Q What about the Preliminary Hearing—you were present at the Preliminary Hearing.

A I was, sir.

Q You also moved for a copy of that transcript, I understand.

A I did, sir.

Q Why did you move for that?

AQ I moved for it because I wanted a copy of everything that pertained to the case, and this was a part of the case.

Q Okay, and why did you want a copy of everything?

A So I could find out for myself what was going on, what really was happening in the case.

Q Were you not being informed then?

A I was not being informed.

Q Why did you move for a copy of the warrants and informations and affidavits in the case?

A No one had given me a copy. No one had told me whether or not there were a copy. I found out later that

there had never been a warrant for my arrest to this day.

Q And so you were never shown a copy?

[47] A No, I was never shown a copy.

I think perhaps my main point for asking for a copy of the warrant was the fact that I was arrested in Hillsborough County by Polk County authorities. I wanted to see what legal right they had, you know, to make this arrest—whether there were a warrant existing or whether there were not.

Q On Pages 64 and 65 of the record appears a petition for right to assist counsel in own defense of cases which we have previously referred to. What was your background for filing that motion?

A As I said, naturally I wasn't qualified to represent myself, but I figured the only way I could get any knowledge about my case, to get any information about what was going on within the case, were to participate in the case myself.

Q Okay, on Page 66 is what is entitled "Petition for Rehearing on Motions Filed in the Court, "September 18th, apparently signed by you. Do you recall filing that motion?

A Petition for Rehearing?

Q Right.

A I do recall filing that, yes.

Q Okay. And what was your reason for filing that motion?

[48] A I think this came as a result of my having a motion denied by the Court, and I wanted the Court to take another look at the motion itself.

Q Do you remember the nature of the motion that you wanted reheard?

A No, I don't.

Q I show you the record, Volume 1, Page 66. You recognize this instrument? A copy?

A Yes, I do.

Q And what is that?

A This is a petition for rehearing on motion filed in the Court on September 18th, 1973.

Q And that's filed by you?

A By me.

Q Pro se?

A Pro se.

Q Okay, and does that refresh your memory as to the reason for filing that motion?

A I think this—I'm not sure. I made no indications here. Oh, this is a motion for—on the bill of particulars and I think perhaps a motion to dismiss—dismiss.

Q And why did you feel compelled to file that motion in your own behalf?

A I think at this time the Court had not—I [49] think the Court had denied my motion to dismiss, and I wanted the Court to take another look at the motion, itself, and to perhaps reconsider, you know, the allegations.

The same goes for the motion for bill of particulars.

Q Did the Court grant your motions to produce the documents, that they be produced to you?

A Yes, they did.

Q Okay. Do you remember who the Judge was who was presiding then?

A I'm not quite sure. It was either Judge Dewell—it was Judge Dewell.

Q And did you receive those documents subsequent to that Court order?

A Yes—subsequent to?

Q Right.

A Yes, I did.

Q And from whom did you receive those documents?

A The Court ordered the Public Defender's office to make copies of everything and give me.

Q And did you all go through the procedure of them passing those to you and you signing receipts and so forth?

A Yes.

[50] Q Do you recall who delivered them to you?

A On some occasions it would be the investigator, Mr. Jim Hill and on other occasions, perhaps, Mr. Dennis Maloney.

Q On Page 82 through 84 of the record is a handwritten motion apparently signed by yourself, entitled a "Motion to Dismiss Indictment of Charges." Do you recall filing that motion?

A Yes, I do.

Q And you filed it pro se?

A I filed it pro se.

Q And why did you file that motion?

A My reasons for filing that motion were based upon the fact that I was innocent of the charges. I also felt that my arrest had been illegal, I also felt that the search and seizure was done illegally. My nature—the nature of the motion, as a whole, was based around the fact that I was completely innocent of the charges, in general.

Q Why did you file these motions instead of your counsel?

A Because counsel had refused to file those motions.

Q Were you the object of any motion for sanction or restriction by either side on the basis of [51] those motions you filed?

A By—by the Public Defender's office I were, and also by the State Attorney's office.

Q And what was the nature of those sanctions?

A They filed a motion with the Court asking the Court to restrict me from filing my motions unless I filed it through them—through the Public Defender's office.

The Court ruled in my favor on that and allowed me to continue to file motions.

Q On Page 93 of the record is a consent for motion for continuance signed by Willie Jasper Darden, Defendant.

Do you recall signing a consent to motion for continuance?

A I do remember. I do recall signing it.

Q What was the basis for your signing that motion, or what was told you the reason for that motion to be signed?

A I was told—when I was told that motion was filed —it was filed in November; wasn't it?

Q November 15th.

A All right. Okay. That was a motion that I was told was being filed in order to allow the Public Defender's office time to go out and retrace [52] my route, the route I had taken from Lakeland to Tampa on that Saturday afternoon.

Q Who actually moved for permission to reroute the route you had taken?

A To retrace the route?

Q Who asked for that relief, though?

A I think it was Mr. Goodwill.

Q Okay. On Page 96 through Pages 104 of the record is a supplemental brief to the motions to dismiss which we have previously identified and testified to.

On Page 109 is a motion to dismiss counsel which is signed by Willie Jasper Darden. Can you tell me, Mr. Darden, is this the first motion you were referring to, or is this the second motion you were referring to?

A I'm pretty sure that perhaps this is the first motion I was referring to—I think. I think that was the motion that was denied.

Q Okay, Mr. Darden. I show you Exhibit 3 and ask you to compare it to the record on Page 109. Are these motions similar, different or the same?

A These are the same.

Q Referring to Exhibit 3 which appears on Page 109 and 110 of the record, particularly going to [53] Paragraph 4, would you read that paragraph out loud?

A "Assistant Public Defender, Mr. Raymond A. Goodwill and Mr. Johnson have acted in such a manner that would cause this defendant to believe that they were working with the State Attorney rather than the defendant."

Q What information, action or statement led you to believe that, Mr. Darden?

A Well, there was a couple of reasons for this. Number one, is that somewhere—somewhere around the first week in October, at least three deputies at the Polk County jail had told me that I was going to be railroaded —no matter what.

That I should watch or keep a careful eye on the people who was supposed to be representing me because they were in cahoots with the State Attorney's office to get me convicted.

I did not accept this hearsay information. But at the same time I did pay much closer attention to both Mr. Johnson and Mr. Goodwill's actions toward me, in general, as well as their actions in the participation of the case, itself. I asked several questions that would give me an opportunity to observe whether or not they was being honest with me and whether or not they was being fair in their representation to me.

[54] From their actions, their association with me and from their communication with me, I had no choice but to conclude that there were some scratching of backs going on within the framework of my case between my attorney and the State Attorney's office.

I reached a conclusion also that it was a "You wash my hands this time, I wash your hands next time."

I got the feeling that the thought that existed between the two parties—the State and my alleged counsel—were that who cared if we send Willie Darden to Death Row, you know. People, I mean, nobody told me, that was my own feeling from observing, you know, the actions that they was taking in my case and their own reaction to questions which I asked them pertaining to the case in general.

There was so many small things that led me to believe that the attorneys were out to make a scapegoat out of Willie Darden, because a crime had been committed; somebody had to pay.

This is the type of attitude that I received from both Mr. Goodwill and Mr. Johnson.

Q Did you recall any specific act or statement which gave you that feeling ultimately?

A Well, there was one statement that was made [55] by Mr. Johnson, himself, and this was a statement that was made at the time that he was asking me to accept a plea bargain. The statement were this, and I quote: "Willie, you are charged with killing a white person. This is Polk County. Now, if they find you guilty, you're going to get the electric chair. Now, I can save you from the electric chair if you plead guilty."

This is one of the statements that was made, and this is the same statement that led me to file a motion to dismiss counsel for good.

In my association with the Public Defenders, both Mr. Johnson and Mr. Goodwill, I reached the vast conclusion that in no way were I going to get a fair trial with these two gentlemen representing me. I mean, it was clearly understood by their ways and actions and their attitude toward me at that time.

Q Can you give me a particular example of their ways and means and attitude?

A Well, their attitude toward me were always harsh. Their communications with me were quite distant.

Q Okay. I need you to give me an example of their harsh attitude and communications, as specifically as you can; date, time, place and persons present.

[56] A Well, when I was speaking about attitudes, I was speaking about the fact that when I sit down to talk with the—with either one of these gentlemen about the specifics of my case, that I get that distant feeling between us of distance they try to put between the question that I ask and me. The indirect answers that I would get and the way they were acting and responding to a question.

Q Give us one example of this, like at what stage and who you're talking about.

A Well, for some reason like—in Mr. Johnson's case when he told me about—when I questioned him about the lineup thing, which was some two weeks after the Preliminary Hearing, he told me that, "I was appointed by the Court to represent you. I am the counsel, you're the client. I handle the case my way. If you don't like the way I handle the case, then you can go to the Court and ask him to get you another counsel." In the manner in which he spoke, this is what I based his attitude upon.

Q You mean it was a harsh statement?

A Right.

Q Or a harsh voice.

A Right. And the same thing has existed in Mr. Goodwill's communication with me, on several levels, [57] you know, by the same manner.

Q Give me a particular example of what you're talking about with Mr. Goodwill.

A All right. When I would question Mr. Goodwill about what was being done in my case—in other words—let me point to a specific point here. I questioned them quite thoroughly about conducting an investigation into my case, you know.

Q When was this now?

A This was prior to my letter to the Governor and to the Attorney General. It was somewhere around mid-October.

Q And where were you at the time?

A I was in the Polk County jail.

Q Okay. And Mr. Goodwill came to see you and talk about the case?

A He came to see me for—not really to talk about the case, but to tell me what he felt, you know, to talk—I consider talking about the case was giving my ideas and feelings and we sat down to have a conversation or discussion.

He told me about—when I spoke to him about investigating the case and checking my witnesses out and so forth, he told me directly that he were not going to do

this. One of the reasons why is that there [58] was money problems, not be financially able to go out and investigate everybody's case. In other words, my case would not be handled any different from anyone else's.

Q He told you that he was not able to adequately—

A Well, he didn't say, he, weren't able to, the Public Defender's office.

Q As best you can remember, tell me exactly what he said at that meeting about that.

A His words were to me, when I asked him about the investigation, were that I cannot expect the Public Defender's office to go out and investigate what every little detail I gave them. He said the Public Defender's office is not financially able to do this. He said, "Your case would not be handled any different from any other person's case."

And the way that he said it and the manner in which he said it, is where I based his attitude. Not so much in the words he spoke, but the manner in which he spoke them.

Q Referring to the exhibit in front of you—the next paragraph, 5—will you read that paragraph out loud.

A "This defendant has reason to believe that [59] the Public Defender's office is withholding certain information from this defendant.

Q Okay. What was your basis for making that allegation?

A Well, I had been questioning them about information concerning my case from the day that I was arrested—from the day that I first spoke to the first public defender up to that point. And it seemed to me that no one wanted to give me any information about my case, about what was going on.

The only thing that I could get was some outside or indirect answers. I wanted to know directly what was being done. I was basing—my whole case was based upon my innocence, and yet, still no one was telling me what they was doing to preserve my innocence.

So when I asked a question, I got no answer at all or an indirect answer.

Q Okay. On Pages 111 and 112 is a handwritten motion apparently signed by Willie Jasper Darden, entitled "Motion to Compel State to Furnish the Items Listed Below." Do you recall filing that motion?

A Yes, I do.

Q Did you file it pro se?

A Pro se.

[60] Q What precipitated you filing that motion?

A That was for the purpose of gathering some information about my case.

Q Will you read Paragraph 4 of that motion, out loud?

A "That the defendant and his Court-appointed counsel have a conflict between them and can't peacefully communicate, and the defendant has filed a motion to dismiss counsel and plans to plead his own case with or without counsel of his own choice, an that the items listed herein are necessary to defendant in preparing his case."

Q Who is the counsel that you indicated you were having conflict with in this motion, Mr. Darden?

A Both Mr. Goodwill and Mr. Johnson.

Q And what was the nature of the conflict?

A The same as I have previously stated.

Q On Page 115 and 116 of the record is what is entitled "Motion to Dismiss Counsel," apparently signed by Willie J. Darden. Do you recognize this motion?

A Yes, it's a copy of the motion.

Q Is this your first or second motion, now?

A That would be the first motion.

Q That's a duplicate, then, of the original [61] motion?

A Right. There was only one motion to dismiss counsel filed, and one motion of waiver of counsel, with the motion to dismiss counsel being filed first.

Q On Page 123 and 124 of the record is a motion to show cause signed by Willie J. Darden. Do you recall filing such a motion?

A I recall filing a show cause motion, but I'm—I just remember the nature.

Q I show you the record, Pages 123 and 124. Does that refresh your memory, Mr. Darden?

A Yes, yes, it does.

Q You recall now filing the motion to show cause?

A Yes, I do. I filed the motion pro se.

Q All right. And what was your reason for filing that motion?

A My reason for filing that motion was pertaining to the fact that I was asking to be allowed to represent myself. At that point I filed a motion for waiver of counsel, same which was granted.

In order to prepare my case for trial I would have needed—I would have had to have certain legal materials on hand I could use to study to brief myself on the legal terms of law and to use them as [62] guidelines in preparing motions and so forth, in getting my case ready for trial.

Q On Page 126 of the record is what is entitled "Motion for Waiver of Counsel," signed by Willie J. Darden pro se. Do you recall filing that motion?

A I did.

Q That was the one that was admitted into the record?

A That is correct.

Q On Page 127 and 128 of the record—and 129 and 130 and 131—is a motion for change of venue and supporting affidavit attached to it, and apparently signed by Willie J. Darden, pro se. Do you remember filing that motion?

A I do.

Q And did you in fact file that motion, pro se?

A I did, sir.

Q And did you file that motion, pro se, as opposed to your counsel filing it?

A That motion came about as a result of several comments that was made to me by both Mr. Johnson and Mr. Goodwill.

Those comments were pertaining to the fact that I was in Polk County and I was accused of killing [63] a white person, and that perhaps I could be taken out of jail and hanged, you know.

This came about during the—this comment came about during the plea bargain discussion with Mr. Johnson. Mr. Johnson stated this for himself.

Q He stated what, to you?

A He said, "Willie, do you realize you're here, in jail, in Polk County, for killing a white person." He said, "I have known people to take peoples out of jail and hang them for such crimes, you know."

This was used, I think, in order to instill in me some fear.

Q But it was in fact said to you?

A It was in fact said to me by Mr. Johnson with Mr. Horton present. And from that I became possessed with the idea that perhaps I should not try to seek a trial in Polk County.

This is the reason I filed the motion for move of venue which was denied.

Q Your motion for change of venue was denied?

A My motion for change of venue was immediately denied by the Court.

Q Okay.

A Were heard and denied.

Q The venue was in fact changed, though; was [64] it not?

A It were.

Q Okay. By what manner was venue changed?

A Apparently the Judge called back to Court and on his own motion—it certainly weren't a motion of mine—and gave the change of venue—go ahead and change the venue.

And at this particular point, I had completely changed my mind about seeking a change of venue. I had felt, for some reason or other, that I could get a fair trial in Polk County.

But most of my reasons for changing my mind at this particular time and not seek a change of venue—which as the record will show, I protested against a change of venue that the Judge granted—based upon the fact that the county he was sending this trial to was already in an uproar because an escaped convict had just killed a highway patrolman in that county. And I felt that to send by trial to that county would be the same as moving my trial from New York City to Mississippi.

So my attorney and I both protested the change, but the Judge granted it anyway, obviously, on his own motion.

Q On Page 129 is a handwritten motion signed [65] by Willie Jasper Darden, pro se, entitled "Motion for Summoning of Witnesses Pursuant to Criminal Procedure Rule 3.313-D. Do you recall filing that motion?

A I do, sir.

Q And why did you file a motion for summoning of witnesses?

A Because my attorney refused to file—not refused to file a motion—he refused to subpoena any of my witnesses.

As you know, from the point of my arrest up until that time—I think that the motion was filed somewhere around January 15th, somewhere along in that time.

Q I'll show you rather than me testifying. Page 129 of the record which is in fact a motion for summoning of witnesses, and see if you can recognize the date on here.

A I don't recognize the date, but I'm sure—I'm quite sure—yes, I remember filing this motion. This was—this motion was filed on the basis of my motion to dismiss the indictment. Those two persons were called to testify at a hearing on that motion to dismiss.

Q Those two persons were who?

A Macie Wright and James Akins.

[66] Q On Page 139 of the record is a handwritten pleading signed by Willie J. Darden, pro se, entitled "Motion to Suppress." Do you recall filing that motion?

A Yes, I do.

Q What precipitated your filing that motion?

A Number one, I had asked my counsel on several occasions to file a motion to suppress any and all evidence that had been seized by the State, and which they had planned to use against me.

Q And what search and seizure were you complaining about?

A Number one, I was complaining of—they seized the automobile. They seized the clothes I had been wearing. They seized a watch that I had been wearing on that particular day. And what I was asking were, that all the evidence be suppressed based on illegal search and seizure.

Q Did you have counsel at that time?

A No, I did not have counsel at that time. But I did—Mr. Maloney did stand up with me and he did participate in the hearing.

Q What period of time were you without counsel? From what date to what date, approximately?

A I'm not—I'm not sure of the date but I [67] do know that it was in December. I did not have counsel up until just a day or so before the trial was scheduled to begin. As a matter of fact, on this hearing for my summoning witnesses, I think it was at this point that the Judge reinstated my counsel.

Q On Page 144 and 145 of the record is a handwritten motion entitled "Motion to Suppress Testimony Not Related to the Charges," signed by Willie J. Darden. Did you file that motion?

A Yes, I did.

Q And did you file that motion pro se?

A I did file that motion pro se.

Q And what was the predicate for your filing that motion?

A I think that—I'm not sure that it's fresh in my memory at this point, but—I do recall the motion, and the nature of the motion was that I had received information that the State was going to use witnesses against me in this case.

The witnesses that the State intended to use were also witnesses that I had planned to use, for the most part, and there was other witnesses who weren't involved in the case, but the State had listed them as witnesses.

So I saw that there was no relevant need for [68] the State to use, say, character witnesses to try to prove their point.

Q Mr. Darden, were you ever subjected to psychiatric examinations during the course of the pendency of these proceedings?

A Yes, I were.

Q When was that?

A During the course of the trial I was taken to TAmpa—taken to Tampa from Citrus County—for psychiatric evaluation.

Q So you were not tested prior to trial, or psychiatric examination?

A I had seen a doctor over in Polk County, which was perhaps pertaining to the same issue.

Q When was that?

A This was back perhaps sometime in October of 1973. This was during the time that I was under the pressure—was in shock over the arrest and what I had been charged with. And I was somewhat out of distance within myself. I think I was sent to a doctor over there for medication for my nerves and so forth.

Q And this examination during the course of the trial—do you recall what day of the trial that was?

[69] A I am not sure, but I think it was perhaps Wednesday afternoon or Tuesday afternoon. It was somewhere along in there, give or take a day—I'm not sure.

Q Did anybody tell you any reason, other than psychiatric examination, why trial was being interrupted and you were going to be submitted to psychiatric testing?

A No.

Q Did you have any indication of any personal problems experienced by any of your trial counsel?

A Please rephrase that question again.

Q Okay. Did you have any indication, objective indication—by that I mean any sign or anything you saw, smelled, heard or otherwise detected—that either of your trial counsel, Mr. Goodwill or Mr. Maloney, were having any personal problems unrelated to the trial?

A Oh, in perhaps in—with Mr. Goodwill, yes.

Q And what indication did you have that he might be having some problem—personal problems?

A Well, I know some—let me state it this way. First of all, I noticed that he showed very little interest in the trial, he seemed to have no [70] enthusiasm for the handling of the trial, itself.

I noticed that on many occasions I would punch him to get him to ask to object to certain issues. And on at least two occasions I smelled alcohol on his breath.

I was never able to really communicate with him. He would sit there and ignore me at the table, especially when, like I say, when I would punch him or explain to him or write something down that I would want him to be reminded of, he just completely ignored the whole situation or—it appeared to me that he was distant—in other words, somewhere else besides sitting in the trial—sitting at the trial.

And other than just smelling whiskey on his breath, I don't think he was drunk—I won't say that because I don't think so. But I did smell whiskey on his breath on at least two occasions.

I did notice the lack of interest, the lack of enthusiasm. And I questioned on two occasions why he was sending Mr. Maloney to cross examine witnesses that he should do, you know, that he should have done, himself.

Q Why do you say he, Mr. Goodwill, should have done the cross examination?

A Well, number one, Mr. Maloney even stated [71] himself that he wasn't prepared to cross examine the witness, and he did not know that he had to do it.

Q Did he state that in your presence?

A Not in my presence, but I heard it. He thought it was out of earshot, but I overheard what he said, what he told Mr. Goodwill.

But Mr. Goodwill said, "You go ahead, you can take care—handle the witness, you know. Mr. Maloney wasn't prepared to cross examine any—any witness. He was also unqualified. Being unprepared made him even more unqualified to cross examine the witnesses.

Q Okay. Going back to Mr. Goodwill, did you actually ever see him ingest any alcohol during the course of the trial?

A You mean drink alcohol? No, I did not.

Q Do you have some familiarity, apparently, with the odor of alcohol?

A Yes, I've had—not only at trial, but on many occasions before trial, you know, that I detected alcohol scent on his breath.

Q During normal working hours?

A During normal working hours, that's the only time I saw him was during normal working hours.

Q Have you had other occasions to see people [72] who were intoxicated, other than—on other occasions have you had the opportunity to see people who were intoxicated—or drunk?

A Are you talking about people in general?

Q Right.

A Oh, yes.

Q How many occasions?

A Quite often—I was around them all the time.

Q Did Mr. Goodwill appear intoxicated?

A I would not say that Mr. Goodwill was highly intoxicated. I would say that perhaps he was mildly in-

toxicated. He seemed to have enough in him to kind of chill his energy. In other words, to not really take an interest in what was going on around him. I noticed that at the trial. This was the only time I really noticed it closely, and perhaps it was because I was sitting between him and Mr. Maloney at trial, so therefore, I was real close, you know, real close to him. Before that point I never really noticed his lack of enthusiasm or lack of interest in anything, even though I smelled alcohol on his breath before that.

Q Did anybody tell you any reason why the trial was being interrupted and delayed one day while you went to have this psychiatric examination?

[73] A The only reason that was given to me was that they wanted to take me over to Tampa and give me this psychiatric evaluation before going any further in the trial.

Q Who told you that?

A I was told this by Mr. Maloney and also the officers that were there, you know, the Court officers.

MR. HARPER: Your Honor, I'm sorry. I obviously underestimated the length of time that I was going to take with Mr. Darden. I can see probably a good fifteen or twenty minutes more, maybe a half hour more.

THE COURT: What's your pleasure, counselor?

MR. PROSPECT: I'm sorry, Your Honor, I didn't hear you?

THE COURT: Do you desire to go on at this hour?

MR. PROSPECT: I'm ready to proceed, yes.

THE COURT: All right. We'll proceed then.

MR. HARPER: Would you mind taking a five minute recess at this point—to freshen up a bit and go to the bathroom?

THE COURT: All right. At Mr. Harper's request, we will take a recess for approximately five minutes.

(Recess, 1:25 p.m. to 1:30 p.m.)

[74] THE COURT: Mr. Harper, you may proceed.

BY MR. HARPER:

Q Mr. Darden, were you represented by counsel during the course of your trial?

A Yes, I was.

Q Who was your counsel?

A Mr. Raymond Todd Goodwill and Mr. Dennis Maloney.

Q And did you in any way participate in your own defense?

A No.

Q Did you stand up and ask any questions?

A No.

Q Did you submit questions through your counsel to be asked of witnesses?

A Yes, I did.

Q How many occasions; approximately?

A At least two dozen times.

Q Did you intend to have witnesses called on your behalf?

A Yes, I did.

Q Did you intend to have exhibits presented on your behalf?

A Yes, I did.

Q And were either exhibits presented on your [75] behalf or witnesses called on your behalf?

A Yes.

Q Beg your pardon?

A Yes.

Q What witnesses were called on your behalf?

A None.

Q And what exhibits presented on your behalf?

A None.

Q Mr. Darden, I show you what has been marked as Petitioner's Exhibit No. 11, and ask you if you can identify this document?

A Yes, I can identify it.

Q And without reading from it, what is this document?

A It's a letter that I had written to Mr. Raymond Goodwill.

Q And do you recall when you wrote this letter?

A Sometime in November, I think it was.

Q Okay. And what precipitated your writing this letter to Mr. Goodwill?

A Because at this particular time it was feared that no motions had been filed that I had mentioned to him previously about filing it, and which he assured me that he would have filed it quite some time before the writing of that letter.

[76] MR. HARPER: I offer this as Petitioner's Exhibit No. 11. It's out of order, Your Honor, but I will come up with a sequence.

THE COURT: That's all right. Is there any objection?

MR. PROSPECT: Yes, Your Honor, to that and any other like it. It comes from the file, trial file, but once again, it's outside the stipulation of exhibits. And if my objection is overruled, I would like a continuance to examine the thing sometime today or tomorrow, whenever it's necessary.

THE COURT: I'll overrule the objection. It will be admitted as Petitioner's Exhibit 11.

And Counsel, during our lunch break, I want you to display all proposed documentary exhibits, and exchange those to the extent that you have not done so.

BY MR. HARPER:

Q Mr. Darden, you earlier indicated that your defense was in the nature of an alibi; and did you, in fact, testify to that alibi at trial?

A I did.

Q And without going into the intimate details of your testimony, what was the sum and substance of your alibi?

[77] A My alibi was based on the fact that in no way that time would have permitted me to be involved in any of the crimes that I was accused of.

Q To that extent, you indicated earlier that Ms. Macie Wright, on Exhibit 1, 5606 87th Street, Tampa, Florida, would be in fact a witness on your behalf.

What would have been the substance of her testimony had she been called as a witness on your behalf?

A Ms. Wright could have testified to the fact that I arrived at home at 6:45 that afternoon, accompanied—in Ms. Simmons' car. She could also testify to the fact that I immediately went to the service station, hired a wrecker and went back to retrieve my vehicle from the ditch, upon finding that my vehicle had been towed away by the authorities.

She could have given testimony to the fact that I immediately called, myself, the Highway Patrol office and the Sheriff's Department.

Q Of what county?

A Both Polk and Hillsborough County.

Q Did you anticipate and plan that she would be a witness in your behalf?

A Yes.

Q Did you or anybody on your behalf prepare a [78] proposed set of questions for her?

A For Ms. Wright?

Q Yes.

A I did. I'm pretty sure I did, nobody else.

Q I show you what has been marked as PEtitioner's Exhibit 8 and ask you if this is in fact the same set of questions that you prepared for the examination of Ms. Macie Wright—or at least a copy of the original.

A Yes, this is the copy of my prepared questions which would have been asked Ms. Wright provided she had given testimony.

Q And what did you do with the original of this copy?

Q I am sure that I gave Mr. Goodwill a copy of that.

MR. HARPER: I offer this as Petitioner's Exhibit No. 8, Your Honor?

THE COURT: Any objection?

MR. PROSPECT: Same as before, Your Honor.

THE COURT: All right. Same ruling. The exhibit will be admitted as Petitioner's Exhibit No. 8 in evidence.

(Petitioner's Exhibit 8 received in evidence)

BY MR. HARPER:

Q On your witness list you indicated Mr. Arthur [79] James Akins, of Tampa, Florida, would have been a witness on your behalf. What would have been the sum and substance of his testimony had he been called as a witness for the defense?

A Mr. Akins could have substantiated any testimony given by Ms. Wright. Mr. Akins lived at our home ever since he began teaching school in Tampa. He was with us that afternoon. As a matter of fact, was in his car that Ms. Wright rode in when we went back to retrieve the car, after I hired the wrecker, which means I was in the wrecker with the driver.

He could have testified to everything that Ms. Wright testified to. He could also testify to the fact that—in spite of the fact that him and I differ quite a bit in appearance; the police, the Sheriff's deputies, questioned him about the alleged crime rather than me. It was I who told the police that I was the one that drove the wrecked car.

Q Mr. J. W. McCoy of Tampa was listed as a potential witness on your behalf.

A That is correct, sir.

Q What would have been the sum and substance of his testimony had Mr. McCoy been called as a witness for the defense?

A Mr. McCoy could have testified to the fact that [80] I arrived at the service station to obtain a wrecker

between 7:10 and 7:20. He could have testified to the fact that I rode with him back to the scene of the accident. That after seeing that the car had been removed by the authorities—of course, I didn't know it had been the authorities at that particular point—that I did, in fact, go into the Lakeland lounge to try to use the telephone, and this is when I found out that the authorities were the ones who had taken the car.

He could have testified to the fact that I rode with him down to the 7-Eleven Store where at which point I used the telephone to call the Highway Patrol, first, in Hillsborough County and the Sheriff's Office of this county, seeking information about the car.

Then after learning about the car, I did call Polk County—both Hillsborough—I mean, both the Highway Patrol station and the Sheriff's office of that county.

Q Who was the owner of the wrecker service?

A Mr. Barnes was the owner of the station. He was running the service station, so I assume he was the owner of the wrecker.

Q Okay. Now, Mr. Barnes is also listed as a witness. [81] A Right.

Q Okay, what would have been his testimony?

A He could have testified to the same thing that Mr. McCoy, except for the trip back. He could have testified to the fact that I arrived at the service station between 7:10 and 7:20. That I paid him in cash for the wrecker, or for the use of the wrecker, and to the time we left his service station to go back to the scene of the accident.

Q Mr. John B. Stone is also listed as a witness, of Lakeland, Florida.

A Correct.

Q Who is he?

A Mr. Stone is a State witness. He was one of the State witnesses. He could have testified to the fact that after I had the accident, after my car skid into the ditch, that he came back to within four feet of me, that he saw me bleeding slightly from the lip and arm. He asked me

were I okay, and I told him that I were okay. He could have given testimony to the fact, also, that he saw a moustache on my lip and a goatee. He could have told them that I had on a different colored shirt than from what the alleged witness stated the assailant had on. He could have also stated to the fact that he saw me throw nothing from my automobile.

[82] So his testimony would have been relevant.

Q Okay. And Mr. Lee Stone of the same address in Lakeland, Florida, was also listed to be a potential witness.

A Right. They are some kids that were riding in the car with them.

Q Okay. And who is Mr. Todd Stone, same address?

A Same, he's one of the kids, too.

Q And Mr. Joseph Stone of the same address.

A Correct.

Q One of the children, also?

A Correct, sir.

Q Who is Jimmy Lawhorn?

A Mr. Lawhorn is the person who helped me repair my car when it gave out in front of Ms. Bass's home. After the police help me push the car out of the street into the driveway, Mr. Lawhorn, his brother and his father were there to help me repair the car.

Q And who is Mr. Robert Lawhorn?

A I don't know whether it's the father or the brother, but it's one of them.

Q And who is Mr. Larry Lawhorn?

A He's the brother or the father.

Q And Ms. Christine Bass?

A Miss Christine Bass is the lady whom I talked [83] with that Saturday.

Q Okay. And where was she now?

A She was at her home.

Q What point in time was this business about the car being broken down, in relation to the accident and in the relation to the alleged assault?

A You mean the time between—

Q The time before and after.

A My car was broken down before I left Lakeland headed back to Tampa, so that would make it before the accident.

Q Okay. And Ms. Mary Simmons.

A Ms. Simmons is the lady I paid to take me to Tampa, after the accident. She saw the accident happen.

Q Mr. Joe Keil.

A Mr. Keil is the police officer who aided me in pushing the car out of the street.

Q And Mr. Charlie Tyus?

A He is Mr. Keil's partner, police officer.

Q And Mr. Jim Hill?

A Mr. Jim Hill is an investigator for the Public Defender's office.

Q And what order would these witnesses have testified to bring your alibi into issue?

[84] A I think that—that testimony would have to begin with Ms. Bass, logically, because she was the last person saw me before the accident.

Q Okay. And who else was there?—Now, Ms. Bass's house; right?

A Right.

Q Okay, who were the other witnesses in that vicinity?

A The Lawhorns—the Lawhorns were there. I met them after meeting Ms. Bass.

Q Okay. And at what point did the Lakeland Police Department get involved?

A They got involved right after Ms. Bass. They came between Ms. Bass and the Lawhorns.

Q Okay.

A I did not meet the Lawhorns until I pushed my car into their driveway.

Q Okay. Then the next witnesses would be the Stone family.

Q The next witnesses would be the Stone family.

A The next witnesses would be the Stone family.

Q Then the people at the garage?

A No, the next witness after the Stone family would be Ms. Simmons.

Q Okay. She's the lady who took you to Tampa?

[85] A That's correct, sir.

Q And then—

A The next witnesses would have been Ms. Wright and Mr. Akins.

Q Okay. And then the garage people.

A Then the garage people—they're the ones I hired the wrecker from.

Q Okay. In preparation for the eventual calling of Mr. Don Neal, you caused certain questions to be drawn up and presented to your counsel.

A Yes, I did.

Q I show you what has been marked as Petitioner's Exhibit 6. Now, is that a copy of those statements or questions you drew up?

A Yes, these are a copy of my questions that I drew up and prepared for Mr. Neal.

Let me say something, counselor. I may have misinterpreted a question awhile ago about the Neal statement. You wasn't referring to him when you were speaking about the police officer who helped me push the car out of the street, were you? Well, he was not one of the police officers, he was the arresting officer.

Q Okay. He's a different—

A Correct, sir.

Q —party than listed on Exhibit 1.

[86] A Correct, sir.

Q Number 14.

A Correct.

Q I show you what has been marked as Petitioner's Exhibit 10. Do you recognize that document?

A This is my inmate bank account at Avon Park at the time of my arrest.

Q And what was the relevancy of this document in your guilt or innocence?

A I subpoenaed that document there, along with the cashier at the inmate bank, to show that on Friday, September 7th I withdrew one hundred dollars from my account for the purpose of having money when I came home from Avon Park.

Q And it has the signature purportedly of Willie J. Darden at the top. Is that your signature?

A Correct. It is my signature.

Q Is this a true and correct copy?

A It is a true and correct copy.

MR. HARPER: I offer this as Petitioner's Exhibit No. 10, Your Honor.

MR. PROSPECT: No objection, Your Honor.

THE COURT: Without objection the document will be admitted as Petitioner's Exhibit 10, in evidence.

[87] (Petitioner's Exhibit 10 received in evidence)

BY MR. HARPER:

Q I show you what has been marked as Petitioner's Exhibit No. 9, Mr. Darden. Do you recognize that set of papers?

A Yes, I do.

Q And what is that?

A This is a line of questions which I drew up and presented to Mr. Goodwill in preparation of his defense, on my behalf. In other words, these are questions he was to ask me when I testified on my own behalf.

Q And did you submit these to your counsel?

A I did submit these to my counsel.

Q And were those questions utilized in your examination?

A Not more than one or two of them.

Q I show you what has been separately marked as Petitioner's Exhibits 6 and 7, and ask you if you can identify those documents?

A Yes. Those were a copy of my list that I drew up for preparation of cross examination of one Don Neal, who was the arresting officer.

Q Which one is that? Which exhibit are you referring to?

[88] A That is Exhibit 6.

Q Okay.

A Exhibit 7 is a list of my personal cross examinations I had intended to ask Mr. Ray Koehler, who was supposedly the radio operator for the Sheriff's Department on the day of the alleged crime.

Q And are each of these three exhibits, 6, 7 and 9, in your handwriting?

A That is my handwriting, sir.

Q And did you submit the original of each of these to your counsel?

A I did, sir.

Q What was the reason that you prepared these exhibits and submitted them to your counsel?

A Because those are the questions that—some of the questions that should have been asked those people providing had they given testimony.

The point was, I was trying to get to the relevant question, you know. Had I, you know, been representing my own self, then I would have asked those same questions. Since I were not representing myself, I passed them along to my attorney for him to ask those questions of those same people.

Q And why did you feel it was important to put it in writing and hand it to your attorney as opposed to [89] some other communication?

A So that there would be no doubt that he had a list of them.

Q Did you have any apprehension about whether these questions would or would not be asked?

A Yes, I did. I had quite a bit of apprehension. This is why I put them in writing. This is why I put them in writing, because I did not want them to later say, "You did not tell me this." I put them in writing, then the record speaks for itself.

Q Was this in part due to your problems in communicating with counsel?

A That is in fact true.

Q Is that the same for all these other questions that you prepared for potential witnesses?

A That is correct, sir.

MR. HARPER: I offer Exhibits 6, 7 and 9 at this time, Your Honor, into evidence.

MR. PROSPECT: Same objection, Your Honor.

THE COURT: Same ruling.

The exhibits will be admitted as Petitioner's Exhibits 6, 7 and 9, into evidence.

(Petitioner's Exhibits 6, 7 and 9 received in evidence)

Q At what point, Mr. Darden, did your counsel, [90] Mr. Hill, indicate to you that he was no longer going to be representing you?

A It came about—between 4:30 and 5:00 one morning. Mr. Hill got up out of his bed at an early hour and came down to talk with me. At that particular time he had already been removed from my case and had already given up the position with the Public Defender's office.

He stated that he wanted to talk to me on a personal level rather than a professional level before he left Bartow, which he was on his way out of Bartow at that particular time.

Q Do you know what date or what month it was?

A No, I do not. I think it was September—last of September or first of October. I'm not positive about the date.

Mr. Goodwill—excuse me—Mr. Hill and I were not only good lawyer and client relationships, we somewhat became friends, too. I did not know that he had been relieved of my case or had accepted another position outside of the Public Defender's office until this morning that he came down to the jail and called me out around five o'clock.

He told me that he wanted to talk to me before he left Bartow for his new position, because he felt [91] there were some things I needed to know about the case and about the people who were going to be handling the case.

And after we shared a few friendly words, he went on to tell me a little about what was happening in the case and what I should be on the lookout for and so forth.

Q And what did he tell you in that respect?

A Generally, he was speaking about the representation now that he was no longer counsel of record.

Q In particular, what did he say to you, Mr. Darden?

A He told me that he was leaving, that my case had been assigned to Mr. Goodwill. He told me also that Mr. Goodwill was a fair attorney but to be careful about him, be on the lookout for him. He also told me that he was sorry to have to say that he didn't think that I was going to get what I expected, from that representation.

He also asked me to go along with him as far as I possibly could, but don't be afraid to speak out if I felt I was being misrepresented.

So this was mostly general discussion on basic things that he thought I should know or some things he thought that I should be up to date on.

[92] Q This was prior to trial, though.

A This was—oh, quite definitely, long before the trial.

Q Going through the trial, and after the verdict was returned, what preparation was done in readying for the sentencing phase of the trial?

A There was no preparation. Once I was found guilty, that was it.

Q What do you mean that there was no preparation? Was there a continuance or a delay between the guilt phase and the beginning of the sentencing phase?

A About ten minutes.

Q And what did you and your counsel do during that ten minutes?

A Nothing. He just told me he was sorry that I was found guilty.

Q Who? Who's "he"?

A Mr. Goodwill and Mr. Johnson. He was over there, too—after I had been found guilty, Mr. Johnson came up and told me, "Well, they found you guilty but don't worry about it; you can always appeal it, you know."

There was—I did more talking with Mr. Maloney than I did with any of the rest of them.

Mr. Goodwill didn't have too much to say other [93] than the fact he was sorry that I was found guilty, and went on off about his business.

Mr. Maloney explained some of what was to take place in this second part of the trial—in other words, the sentencing phase.

Q Prior to that point in time, had anybody discussed with you what was going to take place if, in fact, you were convicted of the charge?

A Other than—not beyond the point where Mr. Johnson once spoke, that if I was found guilty, they were going to send me to the electric chair.

Q Okay. Did anybody prior to the return of the verdict of the jury inform you or discuss with you the procedures that would be utilized in determining your penalty or your sentence?

A No, no.

Q Did anybody go over with you prior to the return of the verdict what aggravating and mitigating circumstances were?

A No.

Q Did anybody go over with you prior to the return of the verdict what, in fact, aggravating and mitigating circumstances were present in your case?

A No, sir.

Q Did anybody prior to the return of the verdict [94] make any investigation with you or question of you as to what possible mitigation you might have?

A No, sir. Mr. Goodwill told me that there was no need to go into that because I would get a pre-sentence investigation thing, anyway.

Q Mr. Goodwill told you what?

A Well, he told me—this was prior to—well, this was beyond the point of the sentencing phase. It was at the time that I went back to be sentenced, rather than to be recommended by the jury.

Q Okay. I understand what you're saying, but I think you might be a little confused.

A I were, but I'm on the right track now.

Q Okay. At what point in time did you and Mr. Goodwill have this discussion about the pre-sentence investigation?

A That was after the jury had brought back in its recommendation. In other words, this was at the time I was taken back to be given the sentence.

Q Okay. Were you in transit with Mr. Goodwill or was this—

A No, this was before—this was over there before the Court but out of earshot of the Judge.

Q Okay. Going back to the time interval between the guilt phase and penalty phase—you understand the [95] two distinctions?

A Correct.

Q Okay. What actually went on during that ten minutes?

A Not—not a thing. Mr. Goodwill's only words to me was that he was sorry that I had got convicted. Then he went off with somebody. I think him and one of the prosecutors went on down the hall.

Mr. Maloney came in and sat down with me in the holding cell and explained it to me that there would be a second part of the trial, which would be the penalty phase.

He said that Mr. Goodwill had not elected to testify on my behalf at this first part of the trial, you know. But I, on my own accord, could give testimony on my behalf, if I wished.

Q Did you discuss any possible mitigating circumstances with either of your counsel?

A No.

Q Do you know now the existence of any possible mitigating circumstances that would have been or could have been utilized on your behalf at that point?

A There would have been, perhaps, at least a couple.

Q Like what, would you say?

[96] A Like one is, I was a family man, I had kids to support. Number two, I never was said to be a violent person. I was struggling to put my son through college. I was buying my own home. I was living the life of a normal every-day working person.

Q Was any evidence produced by the State in the penalty phase?

A I believe so, sir.

Q Do you recall what evidence it was? I don't mean argument, I mean evidence.

A Oh, no, I don't think there was any evidence along that line. I'm not positive. I was pretty shook up at that point.

Q Mr. Darden, when you were brought in, also there was some evidence of some emotional shock or strife, initially, too; was there not?

A When I was brought in?

Q Yeah, when you were initially brought into custody on those charges.

A When I was arrested, yes, sir.

MR. HARPER: Your Honor, this is all we have of this witness at this time.

THE COURT: All right. We will take a recess at this time until 3:15.

MR. PROSPECT: Your Honor, may I make a statement, [97] please? While M· Darden is still on the witness stand and under oath, I respectfully request the Court to ask him if he will waive attorney-client privilege between himself and his trial attorneys?

THE COURT: Do you intend to cross examine him after the recess?

MR. PROSPECT: Absolutely. Yes, sir.

THE COURT: We'll take up that matter at that time. And I would like to see representatives of the Marshal's service during the break, as well as counsel, for just a minute.

We'll stand in recess now.

(Recess from 2:10 p.m. to 3:20 p.m.)

THE COURT: Mr. Harper, are you ready to proceed?

MR. HARPER: Yes, sir, ready for cross. If it please, Your Honor, at the conclusion of the proceeding I had tendered Mr. Darden for cross.

THE COURT: That's correct.

Mr. Darden, please be seated on the witness stand.

MR. PROSPECT: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. PROSPECT:

Q May it please the Court. Mr. Darden, do you [98] know what an attorney-client privilege is, sir?

A Yes, I do.

Q Would you please explain it as you understand it.

A That is your relationship between you and your attorney; confidential. And there are—that attorney cannot reveal confidential information. Is that what your question pertains to, sir?

Q Yes, sir.

By virtue of a petition that has been filed and your testimony today, you've made some allegations against the lawyers that represented you at trial. Will you waive that privilege, at this time?

A I will waive—I will waive the privilege to trial counsel and the Public Defender's office of Polk County of the Tenth Judicial Circuit.

Q Would that include, sir, Mr. Jack Johnson?

A That will include Mr. Jack Johnson.

Q Dennis Maloney?

A Dennis Maloney, also.

Q Raymond Todd Goodwill?
A Absolutely.
Q Gerald Hill?
A Absolutely.
Q Thank you, sir.
[99] As far as you can remember, your arrest took place on September 8th, 1973.
A That's correct, sir.
Q And I believe you testified earlier that you went before a judge for purposes of having a first appearance on the next day.
A That is correct, sir.
Q Can you remember approximately how much time elapsed between your arrest and the Preliminary Hearing—not the Preliminary Hearing, I'm sorry—the first appearance hearing; roughly.
A The first appearance hearing was around eight o'clock Sunday morning. My arrest took place around ten p.m. Saturday night.
Q All right. At that time you spoke with an attorney from the Public Defender's office, Mr. Jerry Hill; is that right? I'm sorry—at the first appearance hearing.
A I don't recall as it being Mr. Jerry Hill whom I spoke to.
Q Was that the attorney that you didn't remember—
A That's correct.
Q —who it was?
A That is correct.
[100] When then is the first time that you spoke to Jerry Hill?
A After the first appearance hearing, sometime later that Saturday.
Q The same day of the first appearance hearing?
A The same day.
Q Now, you testified today that at the hearing you asked the Judge for a lineup.
A Yes, sir, I did.

Q And I believe you testified that the reason for that was according to the arresting officer or officers, someone in authority, you were told that your arrest was conditioned upon being identified.

A I made that assumption, but that was not the purpose for me asking for the lineup. The purpose of me asking for the lineup was based on findings of my own innocence.

Q Yes, sir. Did you communicate that fact to Mr. Hill? Did you ask him to provide you with a lineup?

A I did in fact, sir.

Q You did. Now, you also told Mr. Hill about either people and/or names that you knew at that time that could provide a defense on your behalf in terms of an alibi; is that not correct?

A I don't think that that occurred on that same [101] particular day that's in question.

Q I realize that, but at any time after that.

A Yes, sir.

Q You told him about a lady which you later learned to be Christine Bass?

A That is correct, sir.

Q Two policemen?

A That is correct.

Q Who helped do what, now?

A Who helped push my car out of the street.

Q And two other ladies, and you learned later that those were the two ladies that gave you a ride to Tampa.

A That is correct, sir.

Q And two other people, Macie Wright and Mr. Akins.

A That is correct, sir.

Q Okay. Now, when you told Mr. Hill this, it was, as far as you were concerned, to establish your innocence through the defense of alibi; is that not right?

A The defense of alibi was not in question at that particular time, so I was giving him a list of peoples whom I associated myself with on that particular day.

[102] Q All right, sir. Those people all were involved in an incident surrounding your car breaking down; is that correct?

A No, sir. Ms. Bass was involved in the incident in which my car had broken down in front of her home.

Q All right. Let's stop there. That's where I wanted to start. All right. Your car broke down in front of Ms. Bass's home.

A That is correct.

Q What was wrong with it?

A The wire—the hot wire from the battery had broken in two causing all power to extinguish.

Q Okay, so your car wasn't running and it stopped in front of Ms. Bass's house.

A That is correct, sir.

Q All right. You talked to her.

A Yes, sir.

Q And what did she do, if anything, for you?

A She called the wrecker service on two occasions.

Q Okay. And then the two policemen helped push that car—

A Off of the street out in front of her house and into the Lawhorn driveway of their real estate office.

Q Okay. And what time was this?

[103] A It was sometime around—perhaps a little after three when the car first broke down.

Q And what time did you finally leave that general area? In other words, the car was pushed over to the real estate office driveway; right?

A Correct.

Q All right. Then what happened? Where did you go from there, and how did you get there?

A How did I get to the real estate?

Q After the car was pushed there, what happened next?

A I waited around for the wrecker. At this particular time Ms. Bass had called the wrecker the first time.

Q All right.

A After waiting for some twenty or thirty minutes and the wrecker didn't come, she called the wrecker for me again.

Q All right.

A In the meantime, before the wrecker did come, at least I had left when it did come, if it came, the Lawhorns helped me repair my car.

Q They helped you to repair it?

A That is correct.

Q All right. You got the car running and you [104] left.

A That is correct.

Q Now, what time was that?

A This was somewhere around 5:30 to 5:35, somewhere around in that nature.

Q And that is the last time you saw Ms. Bass.

A That is the last time that I saw Ms. Bass.—Except for seeing her at trial.

Q Okay. After your meeting and discussions with Mr. Hill, how soon after you initially saw him did Mr. Johnson come in contact with you?

A I first met Mr. Johnson for the first time on Monday, September 10th, 1973.

Q Monday following the first appearance hearing?

A The Monday following the first appearance hearing; that is correct, sir.

Q Did you tell Mr. Johnson that you wanted a lineup?

A I did, sir.

Q He told you that he would get you one or see to it that you had one.

A He said that he would request a lineup for either that Monday afternoon or early Tuesday. In other words, he thought it should be done before the Preliminary Hearing.

[105] Q Now, was it at that time—the first time that you met him—that you kind of got the idea—to use your words—that he wasn't all there and that you smelled alcohol on his breath?

A No, sir.

Q It wasn't the first time.

A No, sir. I have—I have no objection to his actions on our first meeting. In other words, he was strictly a well qualified attorney at that particular time.

Q Well, when did he turn on you, so to speak?

A I can't say that he turned on me. I would say that—let's not—let's not—let's take back a step to that particular day. As I stated, at this particular time Mr. Johnson said that he would request a lineup for Monday afternoon or either that Tuesday morning.

All right. I did not see Mr. Johnson again until after the Preliminary Hearing. The lineup was never done, which means to me that Mr. Johnson had lied to me.

All right. The next time that I saw Mr. Johnson was two weeks later, and I approached him with the question as to why he did not keep his promise to me. This is the first time that him and I had a [106] confrontation.

Q Is that when you thought he was not all there and smelled of alcohol?

A That is the first time.

Q Did you share that opinion of him on times after that?

A No. You mean about the alcohol and different things like that, sir?

Q Yes, sir.

A No, sir, I did not, because I didn't feel it was my duty to question his drinking or whatever.

Q I mean, did you think that you smelled alcohol on his breath after the first time?

A Oh, yes, sir, a couple of times.

Q How long after the Preliminary Hearing did Mr. Johnson come to you and try to get you to plead guilty?

A This was sometime in October. I cannot be specific with the date.

Q Beginning? End?

A It was—it was after the assignment (sic), I know. I can't be sure. I can't separate all of the dates.

Q According to your testimony this morning, he came and tried to get you to plead guilty, and this surprised you? It was a surprise that he would even [107] mention this?

A Definitely—definitely.

Q Did he smell of alcohol at that time?

A No, sir, he didn't.

Q Well, obviously your response was no deal; right?

A All the way.

Q After he left, you were then introduced or somehow got in contact with a—apparently a gentleman who you say had a reputation around the area as "Copout Horton."

A This was sometime after that, perhaps a week or so later.

I had been called out to go for some hearing or some type of motion—I just don't remember what it was for. Mr. Johnson and Mr. Horton were there. After the hearing I was taken into the little office off from the Judge's chambers, and Mr. Johnson and Mr. Horton were in the office with me. And this was the time, and the first time, I was approached about pleading guilty by Mr. Horton.

Mr. Johnson was not there for this conversation. He was there at the beginning, in which we were talking about the hearing. Mr. Johnson left and it was Mr. Horton who actually tried to confidence me into pleading [108] guilty, accepting a plea bargain deal.

Q And after Mr. Horton talked to you, when did Mr. Goodwill make the same pitch?

A That was—that was perhaps a week or two weeks before the trial.

Q How did they talk to you? What did they ask you? What did they say with regard to the guilty plea that they—did you feel like you were being forced into something or coerced into something? How was it that they brought it up, as best you can recall?

A Mr. Johnson's first mention about this was somewhat casually done with no hard feelings at this par-

ticular time or anything of that nature. I think he was more or less just putting it to me as a consideration piece.

Mr. Horton—

Q Wait a minute. Excuse me. Consideration of what?

A Accepting a guilty plea.

Q Do you think that perhaps he may have mentioned it as a matter of routine?

A No, no, sir. Definitely not. It could not have been routine, because from the very beginning, from my first conversation with the Public Defender, my innocence was declared. My standing on that stood [109] profoundly. And there should have never been any thought in his mind whatsoever about accepting a plea less than innocent.

Q Did they mention that the State had come to them and began a discussion about pleading guilty in return for a life sentence?

A I was told that if I pleaded guilty that I could get a package deal, a life sentence on the charge of murder with the other charges being dropped.

Q Did you ask Mr. Johnson or Mr. Goodwill or Mr. Hill to see if they could make arrangements to get a polygraph examination?

A I spoke to Mr. Johnson on that subject.

Q Just Mr. Johnson?

A I mentioned it to Mr. Hill, but—and also Mr. Goodwill—but I spoke more firmly with Mr. Johnson because he were the head man.

His statement to me were that, "Willie, you would not want to take a polygraph test when the State, the peoples who are prosecuting you, will be the ones who gives the test.

Q I believe you testified this morning that as a result of certain motions that you filed, the Court entered a motion directing that you would receive copies of everything that the Public Defender received; is that [110] correct?

A That is correct, sir.

Q Did you, as far as you know, receive everything that they received?

A Well, most of everything. There was some things that I did not receive. But I cannot stipulate as to what exactly it were because it's been some time since that happened. The important things that I was supposed to have received, I did receive.

Q Also this morning you testified that the reason you were innocent was because there was no way you could have done it, timewise.

A No, sir.

Q Okay.

A The reason I were innocent is because I were innocent.

Q All right. But I believe I recall you saying that time was a factor; was it not?

A I question the time only because of the fact that the police record, itself, stipulates that the time of the crime occurred around 5:31, that the police were on the scene around 5:34.

Q Okay. So the last time you saw Christine Bass was at 5:32; 5:34?

A ARound 5:31 or 5:34, somewhere along in there, [111] there.

Q Okay. And your information was that the crime occurred at what?

A Around 5:31 or 5:34, somewhere along in there, I'm not sure.

Q Okay. What occurred about 6:30 or 6:45? Do you remember where you were at that time?

A At 6:30 or 6:45? At 6:45 I was in Tampa.

Q 6:45 you were in Tampa?

A 6:45 I was in Tampa.

MR. PROSPECT: Okay, sir. That's all the questions I have, Your Honor.

THE COURT: Mr. Harper.

REDIRECT EXAMINATION

BY MR. HARPER:

Q Thank you, Your Honor. Mr. Darden, are you saying that it's because these attorneys approached you about this plea bargain--is that the reason why you all didn't get along?

A No, that's not the reason. We were having difficulties before that.

Q What were the effects of this plea bargain on you, or the offer of this plea bargain?

A What were the effects?

Q Yes.

[112] A It was very desperate. It—it shocked me because I had stipulated the fact that I was innocent from the very beginning. I constantly awared them of the fact of my innocence and asked them and begged them to do whatever they could to preserve this innocence and to protect me from the injustice which might take innocent and turn it into guilt.

So when they came to me to plead guilty, and I'm thinking these are my own attorneys who are supposed to help me, you know, I mean this to me was very devastating.

Q They were asking you to plead guilty?

A To accept a plea bargain deal.

Q They were asking you to as opposed to telling you that it was available?

A No, they asked me. They did say that they could get the deal—they could get the deal for me. As a matter of fact, they used what I would call a phrase of fear to instill—to instill fear in me toward acceptance.

Q What was that phrase?

A Well, namely, one of them—they used the term that I was—that I was being tried for killing a white person; that this was Polk County; that if I were found guilty, I would get the electric chair.

[113] To me this was like producing fear, you know. So that type of thing to me were not based on a question asking me if I wanted a plea bargain deal, but more instilling in me a certain amount of fear that would make me want to accept a plea bargain deal.

Q Where was this plea bargain offered you?

A Where were it offered me?

Q Yes.

A The first time that Mr. Johnson mentioned it to me—the first time—was when he visited me in the Polk County jail.

Q And were you in a cell?

A No, I was in the little attorney-client visiting area. The second time in which Mr. Horton brought up the question was in the office off the Judge's chambers.

When Mr. Goodwill brought up the offer, it was also in the little attorney-client visiting area.

Q Are you reacting or angry with them because of this plea bargain that you didn't agree with, and accusing them because of that or accusing them of ineffective assistance because of them offering you a plea bargain?

A Oh, no, no, no, sir. No way. It is perhaps their duty to tell their clients that they can get a [114] plea bargain deal or some other thing. I understand that. I have no objection to that.

I do object to them trying to instill a certain amount of fear in me in order to get me to accept their way of dealing with the case.

Q So you think they crossed the line when they tried to scare you into taking the plea?

A Right. They were supposed to be my attorneys, not my enemies.

Accusing them of ineffective assistance is based on the whole case—the whole case in general—their association with the case. In other words, a lack of endurance, their lack of enthusiasm, their lack of interest, their not preparing the case for trial in an orderly manner.

Even to the point where at one time it was stated by Mr. Goodwill that this was the first death penalty that that office had had under the new death penalty statute. It were not prepared for it—they did not get themselves prepared for it after I became their client.

My—basing my ineffective assistance of counsel is not based on the individuality in association with the case according to one person represented and another person represented and their association with [115] me. But it is based on the whole case in general as to their actions; actions not only with the case, but with me, also.

I feel that if they are my counsels, they are there to protect me, not to cast me in the hands of the lion.

MR. HARPER: That's all I have, Your Honor.

THE COURT: Mr. Darden, I have one question for you.

BY THE COURT:

Q Mr. Darden, you testified that no witnesses were called in your behalf and I have heard testimony about potential witnesses. You also testified that there was no exhibits on your behalf. Did you have any exhibits to introduce?

A Only some photographs of myself, Your Honor, which was taken prior to my arrest. These photos would —my reason for wanting to introduce those photos was the fact that the alleged witness, in her statement and their statement, stated that the person was clean-shaven. These photos could have shown that I did have a moustache and a goatee on the date of my arrest. And Mr. Stone, who was one of the State witnesses, testified to that effect, that I did, indeed, have a moustache.

Q Who took the photographs in question?

[116] A The photos were taken by a friend of mine here in Tampa, with one of those little photo cameras.

Q Were you photographed at the time of your arrest?

A Yes, sir. You mean after I was taken to the jail? Yes, sir. Those photographs will show also that I had a moustache.

THE COURT: Counsel, any further questions?

MR. HARPER: No, Your Honor. But I introduced an exhibit from his inmate fund that would have been a purported exhibit on behalf of the defense in the case in chief. In the trial proceedings below—is one of the various exhibits which are in evidence.

THE COURT: All right. I'll hear argument in that connection.

Any other questions?

MR. HARPER: No, sir.

THE COURT: Counselor?

MR. PROSPECT: No, Your Honor.

THE COURT: Mr. Darden, you may step down, and have a seat at the counsel table.

(Witness retires from stand)

THE COURT: Call your next witness.

MR. HARPER: I call Ms. Macie Wright.

[117] THE COURT: Incidentally, my office has received word that Judge Maloney is on his way to Tampa.

MR. HARPER: Ms. Christine Bass.

Thereupon:

CHRISTINE F. BASS,

a witness appearing on behalf of Petitioner, having been first duly sworn, was examined and testified as follows:

THE CLERK: Repeat your name for the record, please.

THE WITNESS: Christine F. Bass.

DIRECT EXAMINATION

BY MR. HARPER:

Q May it please the Court. Ms. Bass, state your full name for the Court, please, ma'am.

A Christine F. Bass.

Q And your address?

A 2304 Lakeland Hills Boulevard, Lakeland, Florida.

Q And what is your occupation, please, ma'am?

A Secretary.

Q And where are you employed?

A Lakeland General Hospital, Chaplain's office.

Q And how long have you been employed in that [118] capacity?

A Eight years in October, last of this month.

Q Do you know Mr. Willie Jasper Darden?

A I've met him before.

Q All right. When did you first meet him?

A September 8, 1973.

Q And how often have you seen him since that day? Or how many times?

A I saw him one day at the trial when it was being held in Inverness, as they were bringing him in.

Q And have you seen him any other time besides today?

A No, sir.

Q And you were present at the trial proceedings in Inverness?

A Yes.

Q And did you receive some court process requiring you to be in Inverness?

A I was subpoenaed.

Q By whom were you subpoenaed?

A The defense.

Q Did you appear each and every day pursuant to that subpoena?

A Yes.

Q How many days did you go to Inverness?

[119] A Five days.

Q And how far was that from your home to Inverness?

A I can't recall the exact mileage right now.

Q Approximately.

A It's about a two-hour drive.

Q Each way?

A Yes.

Q Did you testify in the proceedings on behalf of either side?

A No, sir.

Q Did anybody tell you why you did not testify?

A No, sir.

Q Did you talk to any of the lawyers involved in the case?

A I talked with Mr. Hill, the first Public Defender that came out. And then I approached the assistant to the defense attorney on the morning the trial was canceled, about a time element. And he said, "I'm sure we will want to talk with you."

But I never did make any other contact and they didn't make any contact with me.

Q All right. Let's start with your first contact with Mr. Hill. Is that Mr. Jerry Hill?

A Yes.

[120] Q When did you have contact with him?

A It was probably a couple of months—I can't recall the exact day—but he came out to the house to see me—it was on a Saturday, and he came out to ask me if I had helped a black man with car problems recently.

And I said, "Yes."

And then he said, "Well, I need to talk with you."

And he made an appointment to come back and talk with me. I think it was about Monday or Tuesday of the next week. I can't recall the exact day on that.

Q Did he come back?

A Yes, he came back.

Q Okay. And did he record your statement?

A Yes.

Q And what was the nature of the statement that you gave; generally?

A The nature of the statement was that about me answering a plea for help at my door on a Saturday afternoon.

Q Was it generally a statement about what your testimony would be at trial?

A No, sir, it was just a statement.

[121] Q Of what happened?

A Of what happened that afternoon.

Q What did you tell Mr. Hill?

A I told him as best to my knowledge at that time, that I could recall at that time, about Mr. Darden knocking at my door and asking for help and asking me to call a tow truck, which I did.

Q Do you remember what tow truck you called?

A I called Silver City Garage.

Q Okay. And do you know what time that was?

A That was at four o'clock.

Q Okay. Then what happened?

A They wanted to know the color of the car and the make of the car. And so I told them that it was a black man and that he had stalled and he needed some help. And so the children—the girls went out to get the make of the car and the color from Mr. Darden. And we had a little disagreement about the color, because they went up close to it and I was a little ways back from it.

And I gave the lady all this information on the telephone, and she said they would send somebody out shortly. And so I went back and told Mr. Darden and then I stood outside and talked to him for about twenty-five minutes, because I looked at my watch and it was [122] twenty-five minutes after four and it had started misting real hard—it was raining. And I went in—I excused myself—and then I went in and he went back to his car.

Q Okay. Did you have any other contact with Mr. Darden other than the incident involving him being stalled out in front of your house that afternoon?

A I looked out my window at 5:15 and I saw Mr. Darden and his car. But earlier, before that, I had seen two policemen pushing his car off of Lakeland Hill Boulevard.

Q Do you know who those two officers were?

A I later found out that their names were William Kiel and Charles Tyus.

Q Did you see them at the trial proceedings, Ms. Bass?

A Yes.

Q Did either of them testify during the course of the proceeding?

A No, sir.

Q Okay. Go ahead.

The car was pushed off the side of the road where?

A The car was pushed—the policemen had pushed the car onto the Faatz Limb Brace Shop, there at the [123] corner of Tarawa and Lakeland Hills Boulevard. I have full view from the living room window of the parking area and I looked out at 5:15 and I made a statement to the girls who were in the kitchen playing cards that it was 5:15 and the tow truck had not arrived; and he was leaning up against his car.

Q "He" being who?

A Mr. Darden was leaning up against his car.

Q This man sitting here?

A Yes.

Q You recognize him today?

A Yes.

Q All right. Go ahead.

A He was leaning up against his car patiently waiting. And then—and in the process of cleaning up the kitchen and going back and forth, I had taken some garbage out to the back. And on the way back into the house I glanced and saw someone else was with him.

Q Do you know who that was?

A That was Mr. Lawhorn, Vic Lawhorn.

Q All right.

A Vic's wife and Larry Lawhorn.

Q I looked at my watch and noticed that it was twenty-five after five, and then I thought, well, if he got it fixed, he wouldn't have an opportunity to make [124] it where he was going. And I went back through the house and stood in front of the living room window and looked and saw who it was and how they were standing.

Q And what did you see?

A I saw Larry, which would be the left-hand side of the car, then Vic's wife, then Mr. Lawhorn, and Vic was standing at the front of the hood. He had his head underneath the hood working on Mr. Darden's car. Mr. Darden was standing at the right-hand side of the car.

Q And this was at what hour?

A It was shortly after 5:25.

Q Okay. Then what happened?

A The next time I looked it was twenty-five minutes to six and his car was gone.

Q Okay. And you told all of this to Mr. Jerry Hill at your appointment?

A I told all of this except the time of me going out to the garbage can and coming back in, because I did not remember that, but a time element kept bothering me.

And one day I had went out to the garbage and it came to me what that was. And I tried to make contact with Mr. Hill, and I called the number he had given me and they said he was no longer on the case.

[125] Q And what did you do when you got that information?

A Well, there was another murder committed there in Lakeland—

Q Go ahead.

A —which was later on. But what did I do with that information?

Q Right.

A That was information that I wanted to give to the attorney at trial, about the twenty-five minutes after five time.

Q Okay. Did you ever convey that to the attorney handling Mr. Darden's case?

A The day that the trial had been called off—

Q Okay. Now, excuse me just a second. This was during the trial proceedings?

A During the trial proceedings.

Q This was in January of '74?

A Yes.

Q Do you know what day it was that the trial was called off?

A I believe it was a Thursday.

Q Do you know what reason the trial was called off?

A They said that his defense attorney was sick.

[126] Q Okay. Who said that?

A The one that came into the room, I don't know who it was.

Q Okay, was it a Judge? Or was it a bailiff? Or was it an attorney?

A It was a bailiff, I believe.

Q Okay. So who did you talk to that day?

A We were all in the parking lot and everybody was going to their cars. And I saw this man and I asked him if he was the defense attorney's assistant, and he said, yes.

I introduced myself and told him—

Q Do you remember his name, Ms. Bass?

A Right now I can't recall his name.

Q Okay, go ahead.

A And I told him—I introduced myself and told him who I was and told him that I could pinpoint Mr. Darden as being at the Limb Brace place at twenty-five minutes after five and two or three minutes even later.

Q Okay. And what did he say to you when you gave him that information?

A He said—he thanked me for it and said, "I'm sure we'll want to talk to you and we'll get back in touch with you."

[127] Q Did anyone from the Public Defender's office or the defense team get in touch with you?

A No, sir.

Q Were you later excused from attendance, from being a witness in the case?

A I didn't hear anything else except that Friday afternoon when the trial was over, they excused us—if that's what you're talking about.

Q That's what I'm talking about.

Who told you that you could go home? Or what did they tell you first?

A They just came in and said it was over and there wouldn't be any point in us coming back on Monday.

Q Okay. Do you remember who came in and told you that?

A No, I can't recall who came in and told us that. But we were dismissed.

Q Were you in the witness room with other witnesses, Ms. Bass?

A Yes.

Q Do you recall the names of the other witnesses that you were in the room with?

A Well, I was in the room with Mrs. Turman, Mr. Arnold, Mr. Stone, Mr. Keil, Mr. Tyus, and the tow truck driver—I can't recall his name—he came from [128] Tampa. Then the two black girls—one of them's last name is Simmons. She lived there in Lakeland. She went with me to the trial with me on Friday and came back with me on that day.

Q Do you remember if the Lawhorns were present?

A They did not stay in the room with us. They stayed out in the hallway. But Mr. Lawhorn was there and Larry was there.

Q Did you ever meet a Ms. Macie Wright?

A Yes, I met Ms. Macie Wright.

Q Was she there?

A Yes.

Q And what about Mr. Arthur James Akins, do you remember him?

A There was a lady—there was a man with Ms. Wright who was her boarder, and I don't recall his name.

Q Do you recall if any of those witnesses took the stand and testified on behalf of Mr. Darden?

A No, sir.

Q You don't recall? Or you don't remember? They weren't called, or what?

A I do not remember any of them being called on behalf of Mr. Darden.

Q All right. I may not have asked my question very clearly. Were any of them called? Or were they not [129] called? Or do you remember?

A There was not any of them called on behalf of Mr. Darden.

Q And they were all present on the last day of the trial?

A They were all present.

Q Are you familiar with the Turman Furniture Store?

A Approximately. It's been torn down since.

Q Okay. How far is it from your house to that location?

A It's a good twenty-minute drive either way you go, and you have to be driving kind of fast at that rate.

Q Did any of the defense attorneys have any discussions with you besides the contact that you initiated during the course of the trial proceedings?

A No, sir.

Q Did they, to your knowledge, have any discussions with any of the other witnesses who were there on behalf of the defense?

A Well, I asked Mr. Simmons the last day of the trial if anyone had talked to her and she said no. I asked Mr. Tyus later if anyone had talked to him, and he said no, they only had his statement.

[130] And, as far as I know, none of them had any discussions with the defense attorney.

MR. HARPER: I believe that's all we have of Ms. Bass at this time, Your Honor.

THE COURT: Mr. Prospect.

MR. PROSPECT: No questions, Your Honor.

THE COURT: May this witness be excused?

MR. HARPER: Okay.

THE COURT: All right. You are excused from your subpoena. Thank you.

(Witness retires from courtroom)

THE COURT: Call your next witness, please.

MR. HARPER: Your Honor, if it please, I'm as far as I can go without Judge Maloney.

THE COURT: He is not here?

THE MARSHAL: No, Your Honor.

THE COURT: The message I have at 3:30 is that he left and was on his way here. So we'll take a recess until he appears. We'll stand in recess.

(Recess, 4:10 p.m. to 4:30 p.m.)

THE COURT: Mr. Harper, are you ready to proceed?

MR. HARPER: Yes, Your Honor.

THE COURT: Call your next witness, please.

MR. HARPER: We call Judge Dennis Maloney.

[131] Thereupon:

DENNIS P. MALONEY,

a witness called on behalf of Petitioner, being first duly sworn, was examined and testified as follows:

THE CLERK: Repeat your name for the record, please.

THE WITNESS: Dennis P. Maloney.

MR. HARPER: If it please the Court—

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. HARPER:

Q Judge Maloney, state your full name, please.
A Dennis Paul Maloney.
Q And your occupation?
A County Judge for Polk County, Florida.
Q And how long have you been in that capacity?

A It will be three years in January.

Q And you were elected to that post?

A Yes, sir.

Q And what was your occupation prior to that?

A Assistant Public Defender.

Q And was that also in Polk County?

A Yes, sir.

Q And how long had you worked for the Public Defender's office prior to assuming the bench?

[132] A Approximately four years.

Q And what was your capacity with the Public Defender's office during the last quarter of 1973 and the first month of 1974?

A During the last quarter of '73 I would have been a legal interne. I didn't pass the Bar until October 18th of '73.

I was a junior assistant during the month of January, 1974.

Q Okay. When were you actually sworn in?

A October 17th, 1973.

Q And did you in any way participate in the representation or the preparation of the defense in the State of Florida vs. Willie Jasper Darden, Case No. 73-2073, as it grew out of Polk County and was subsequently transferred to Citrus County for trial?

A I did.

Q And what was your capacity; generally?

A Generally speaking, I did research for the trial attorneys.

Q And who was the trial attorney?

A Todd Goodwill was the trial attorney.

Q Do you recall your first involvement in the case of State of Florida vs. Willie Darden?

A I do.

[133] Q And what was that?

A I assisted Jerry Hill in the Preliminary Hearing.

Q And you you recall your last involvement in the case of State of Florida vs. Willie Darden?

A I do.

Q What was that?

A I either filed the notice of appeal or my last involvement was at the sentencing of Mr. Darden. I'm not sure who filed the notice of appeal.

Q Would it be fair to say that your involvement continued from the early stages at least until—at least from the Preliminary Hearing through the disposition in the Circuit Court?

A Yes, sir.

Q Your Honor, I show you what has been marked as Petitioner's Exhibit, respectively, 12 through 28, and ask you if you can identify those documents?

A I do identify State's Exhibit 12, or Petitioner's Exhibit 12.

Q Okay. Will you go through them all, first, and then we'll go back through them.

(Witness examines said documents)

Q (Continuing) Judge Maloney, you said you could identify Exhibit No. 12. What do you identify [134] Exhibit 12 to be without reading from the document?

A It's a Florida Uniform Traffic Summary.

Q And where did you identify that document from having prior experience with it?

A That was part of the discovery furnished the defense in the State vs. Darden.

Q Was it then made a part of the Public Defender's file?

A It was.

Q Were the other exhibits there part of the Public Defender's file?

A They were.

Q All of them?

A I don't know.

Q Can you identify other instruments there as being part of the Public Defender's file?

A Yes, sir.

Q Okay. Particularly, you identify Exhibit 12 as being such a part of the Public Defender's file.

A I would say Petitioner's Exhibit 14 is an Offense Report from the Polk County Sheriff's Office, was also furnished to us in discovery.

Petitioner's Exhibit 15 is Offense Report from the Polk County Sheriff's Office, which I believe was furnished to us in discovery.

[135] Petitioner's Exhibit 16 is a summary by Investigator Jim Hill. He was the chief investigator for the Public Defender's office.

Q So that would be work product instead of discovery.

A Yes, sir.

Q Okay.

A Exhibit No. 17 is an Offense Report from the Polk County Sheriff's Office, which I assume was furnished to the Public Defender in discovery.

Petitioner's Exhibit 18 is an Offense Report by the Polk County Sheriff's Office, again I assume it was furnished to petitioner after demand for discovery.

Petitioner's Exhibit 19 is an Offense Report by the Polk County Sheriff's Office, which I assume was furnished to the Public Defender pursuant to a discovery motion.

Petitioner's Exhibit 20 is also an Offense Report by the Polk County Sheriff's Office.

Petitioner's Exhibit 22 appears to be trial notes or notes made in preparation of trial from depositions, and I do not know exactly what it is nor do I know exactly who wrote them.

Q You do not recognize the handwriting of those notes?

[136] A I cannot honestly say that I recognize the handwriting on all the notes. I note that the handwriting changes in Petitioner's Exhibit 22. Notes were taken generally by myself, Mr. Goodwill, Mr. Hill—Mr. Jerry Hill and Mr. Jim Hill—and Mr. Johnson.

The notes change here and I really do not recognize the handwriting.

Q And do you recognize Exhibit 23?

A Exhibit 23 is, again, apparently trial notes or notes made in preparation of trial.

Q Can you identify them?

A I do not know who did this work. I would guess that they were done by Jerry Hill, because it's very early notes, very early on, and Mr. Hill was the first lawyer to speak with Mr. Darden.

Q What about Exhibit 24?

A Exhibit 24 is a summary of investigations done by Chief Investigator Hill.

Q That's Jim Hill?

A Yes, sir.

Q That would be work product notes?

A Yes, sir.

Q And you recognize those?

A Yes, sir.

Q Okay. What about Exhibit 25?

[137] A The same.

Q Namely work product notes by Investigator Jim Hill, which you recognize?

A I recognize that only because I recognize Jim Hill's signature. Petitioner's Exhibit 25 is typed.

Q Okay. What about Exhibit 26?

A It's a handwritten summary of notes from investigation by Investigator Hill.

Q And you recognize those notes?

A Yes, sir.

Q By the handwriting?

A Yes, sir.

Q And that's work product by Mr. Jim Hill?

A Yes, sir.

Q Okay. And do you recognize Exhibit 27?

A No, sir, I do not recognize Exhibit 27.

Q Okay. Do you recognize Exhibit 28?

A I recognize the handwriting of Jack Johnson; other than that, I do not recall it.

Q Can you ascertain whether those notes were made during the course of the trial or pre-trial?

A No, sir. The document is not dated.

Q Okay. Do you recognize the handwriting of those notes?

[138] A I'm virtually certain that that is Jack Johnson's handwriting.

Q Do you recognize them from having seen those notes before?

A No, sir.

Q What about Exhibit 29? Do you recognize that exhibit?

A Yes, sir.

Q Okay. From where do you recognize that?

A Handwritten notes by Mr. Darden. I'm sorry. Handwritten notes by Mr. Johnson, dated January 22nd, 1974.

Q That would have been part of the Public Defender's file? Or would have been?

A Yes, sir.

Q Now, we skipped over Exhibit 13, which I have indicated is a Sheriff's Office report. Do you recognize that document?

A I recognize it as a Sheriff's Office report, yes.

Q Do you recognize it as being related to the discovery provided in this case as a part of the Public Defender's file in the case of the State of Florida vs. Willie Darden?

A I assume that it was. It does relate to an [139] assault to commit rape, the victim is Mrs. Helen Turman, the date is September 8, 1973.

Q Do you recognize the document in other respects?

A No, sir.

MR. HARPER: Your Honor, at this time I would offer Exhibits 12, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26 and 29, in evidence.

THE COURT: May I inquire which ones you are leaving out at this stage?

MR. HARPER: Your Honor, at this time Exhibits 13, 22, 23, 27 and 28.

THE COURT: Mr. Prospect, any objection?

MR. PROSPECT: Not in light of the prior rulings, no, sir.

THE COURT: Without objection the exhibits identified will be admitted as Petitioner's Exhibits No. 12, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26 and 29, respectively.

(Petitioner's Exhibits 12, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26 and 29, respectively received in evidence)

BY MR. HARPER:

Q At the point of your involvement in the Darden case Judge Maloney, back in the fall of 1973, how many felony trials had you had under your belt?

[140] A I feel confident in saying none. At the point of my initial involvement, I was not a member of the Bar.

Q All right. And at the point of the trial actually beginning some weeks or months later in January, how many trials had you had under your belt?

A Felony?

Q Right.

A I do not know the exact answer. I feel confident in saying less than six.

Q Okay. And you were co-counsel then with Mr. Raymond Todd Goodwill?

A Yes, sir.

Q Okay. He had somewhat more experience at that point in time; is that correct?

A Yes, sir.

Q How long had he been in the Public Defender's office at the point of undertaking this case?

A I believe that Mr. Goodwill had been an Assistant Public Defender, part-time, from January of 1973.

Q Starting in January of '73?

A Mr. Harper, I got there in March of '73—I got there in April, April 1st of 1973. Mr. Goodwill was on the staff at that time. I believe he started [141] as an Assistant Public Defender with Mr. Johnson in January of '73. But he might have worked for Mr. Horton when Mr. Horton was the Public Defender.

At that time it was a part-time job. So in answer to your question, how long had Mr. Goodwill been an Assistant Public Defender, I guess the honest answer is I don't know.

Q How many capital cases had been tried in the Public Defender's office, subsequent to your being involved with that office and prior to the time of Darden?

A None.

Q Okay. So this was the first capital case that you all had after the post-Furman ruling?

A Yes, sir.

Q How were you assigned to the Darden case? Who actually said that you were going to be involved?

A Mr. Johnson.

Q And do you remember under what circumstances he informed you of that decision?

A I do know what my general assignments were. I do not recall the conversation I had with Mr. Johnson assigning me to the case.

Q As far as your involvement in this case, were you responsible to report to Mr. Goodwill and Mr. Johnson [142] your regular activities that involved the Darden case?

A Yes, sir.

Q And to whom were you to report?

A When Mr. Goodwill was appointed to try the case I'm sure I was to report it to Mr. Goodwill, although Mr. Johnson kept a constant interest in the case. And I think that nothing that happened during the pre-trial proceedings escaped his attention.

Prior to Mr. Goodwill being appointed to try the case, I would have reported my work to whatever lawyer happened to be doing the work at the time.

Q When you say "whatever lawyer," were there several lawyers assigned to the case?

A There were.

Q Why was that?

A It was not until sometime after Mr. Darden was arrested and there were several preliminary proceedings that a lawyer was assigned to try the case.

Q Do you know what point in time that was?

A No, I don't.

Q Can you give me an approximation in sequence of events relating to the Preliminary Hearing or—

A My guess is that no attorney was assigned to try the case until after the indictment was returned. I do not know when the indictment was returned.

[143] Q Do you know when Mr. Goodwill was actually assigned?

A No, sir.

Q At the point of the Preliminary Hearing, your status with the Bar was as an interne or as a member of the Bar?

A I was an interne, sir.

Q Okay. And do you recall approximately what date the Preliminary Hearing was?

A September 13th.

Q 1973?

A Yes, sir.

Q Were you actually assigned to be trial counsel?

A No, sir.

Q How did you come about to be participating as trial counsel?

A There were numerous legal issues that we felt should be raised and argued. Generally speaking, I was a research assistant who was to research the legal issues.

On one issue, that is a motion to suppress in-court identification based on tainted prior objections, I was the attorney assigned to argue the motion.

[144] Q You said there were numerous legal issues. What are some of the other legal issues that were identified by your office on behalf of Darden?

A Well, certainly the motion to dismiss the indictment as unconstitutional was filed.

Motion to suppress the identification in court was filed.

If I'm not mistaken, there was a motion to suppress physical evidence, which was filed.

There was a motion filed arguing an illegal arrest.

Q Was that pro se or was that by your office?

A That's a difficult question. Mr. Darden filed many motions and, generally speaking, we argued the motions that Mr. Darden filed.

I do not have specific recollection of filing the motions that I gave you. I'm sure we filed the motion to dismiss the indictment. I feel confident that we filed the motion to suppress any evidence as a result of an illegal arrest.

Mr. Darden filed many motions. And I do not know if we also filed those motions.

Q Were you actually assigned trial responsibilities? By that I mean when you undertook the case, did anybody say to you that you were going to be responsible [145] for a certain portion of the trial proceedings or for undertaking certain responsibilities during the actual trial?

A Prior to the trial I was never informed that I would do any actual work before the jury.

Q Okay. But in fact you did do a considerable amount before the jury; is that correct?

A That is correct.

Q Do you recall what all you actually did do in front of the jury?

A I did the voir dire examination, I cross examined five or six witnesses, I did the closing argument.

Q Okay. When did you learn that you would be responsible for these actions and activities in the presence of the jury?

A I knew that I was going to do the voir dire examination on the morning of the voir dire examination.

I generally knew that I was going to cross examine a particular State's witness while that witness was on the stand. I knew at least one day before the closing argument that I would do the closing argument.

Q Who told you that you would be responsible for voir dire?

A Mr. Goodwill.

[146] Q And he told you the morning it came time to start selecting the jury?

A That's correct.

Q Were you familiar at that point with the intricacies and intimacies of the Witherspoon case?

A I knew, Mr. Harper, what Witherspoon stood for. I did not know how to properly couch the question that is now asked with reference to Witherspoon.

Q Who assigned you the responsibility of cross examination of witnesses while they were on the stand?

A Mr. Goodwill.

Q So that actually during the course of direct examination you learned that you would be responsible for cross examination?

A Correct. If I—don't wish to cast an unduly hard view of this. I had been responsible for preparation of all witnesses. So I had been through all the depositions and made notes of that. I had been through all the discovery.

I don't wish to suggest that I went into cross examination "cold turkey" so to speak.

I do wish to tell you that I was not informed that I would do cross until sometime during direct.

Q Did you actually interview any one of the witnesses on behalf of the defense?—Namely, in [147] preparing for direct examination.

A Yes, sir, I did.

Q Do you know who?

A If I could see a defense—defendant's response to demand for discovery, I could.

MR. HARPER: Exhibit 1, please.

BY MR. HARPER:

Q I show you what has previously been marked and received as Petitioner's Exhibit 1.

A Okay. These are Mr. Darden's, I think. Is that correct?

Q Yes.

A Do you have the Public Defender's response?

Q I show you what has been marked as Petitioner's Exhibit No. 2.

(Witness examines said document)

Q (Continuing) Do you recall now, after refreshing your recollection from Exhibit 2, Judge Maloney?

A To be honest, Mr. Harper, I do not recall specifically interviewing these people. I know that I interviewed defense witnesses, many of them. I know that all of them were interviewed by Mr. Hill.

Q You indicated that you had gone through discovery depositions prior to undertaking cross examination of State witnesses; is that right?

[148] A Yes, sir.

Q Did you participate in the taking of any of the depositions?

A I do not recall that I did, sir.

Q Okay. Had you had an opportunity prior to trial to interview any of the witnesses, personally? Or did you interview any of them, personally, prior to trial, I should say. State witnesses, I'm referring to.

A I have no recollection that I did, sir.

Q How was it in way of factual context made known to you that you would take a particular witness on a cross examination? What was said to you? Who said it? And the context of the proceedings at which the statement was made to you.

A Mr. Goodwill would simply lean over and say, "You're going to do cross."

Q And that was sometime during the direct examination and sometime after the direct examination?

A I cannot recall a specific incident when I was informed after the direct examination. Certainly it oc-

curred during the direct examination or at the very close of the direct examination.

Q This, of course, was the first capital case that you had participated in; is that correct?

[149] A Yes, sir.

Q Do you know if this was the first capital case that Mr. Goodwill ever participated in?

A I believe it was.

Q Now, as far as your participating in the trial, do you have an opinion as to the effectiveness of counsel?

MR. PROSPECT: Obpection, Your Honor. That's a determination that you have to make.

MR. HARPER: Your Honor, I think this witness is qualified as to whether or not it was effective or not effective and give a reason for it. It's certainly an opinion on the part of the witness, and I think he's certainly in an intimate position to make that opinion.

MR. PROSPECT: If that's true, Your Honor, I can bring several witnesses here who would claim the opposite of what he's about to testify to.

I repeat that this is a determination that you must make, that's why we're here today.

THE COURT: I'm going to withhold ruling on the objection and I'm going to direct the witness to answer the question.

In that regard it might be appropriate—and I'll listen the first thing in the morning on the [150] issue of admissibility of evidence bearing on the competency of counsel, in relation to other attorneys similarly situated.

I'm going to hear the testimony. Answer the question as best you can.

A The trial was not a mockery and a farce. If the issue to be decided is whether Mr. Darden had reasonably effective assistance of counsel, I don't know.

I would certainly say that it was one of the worst tried cases, from the defense part, that I have ever been associated with.

Q Upon what facts do you base that point of view, Your Honor?

A Pre-trial tactics, for one thing; in-trial tactics, complete lack of control of the defendant, lack of knowledge of jury selection in a capital case, lack of a coherent defense in the mitigation portion of the trial.

Q As far as particulars in the way of demonstrating the pre-trial deficiencies—if you will, for lack of a better word—what specifically as particular examples would you cite?

A Defense, in this case, had always been that Mr. Darden was not there. The issue was ID. We severely compromised that defense by having a preliminary hearing [151] four days after the incident. We should have waived the preliminary hearing and demanded a lineup, or simply waived the preliminary hearing. Because of the photograph of Darden in the local newspaper the day after the murder it perhaps would have been advisable to have no lineup.

It most certainly was inadvisable to have the preliminary hearing.

Q Why do you say that was a bad decision? What happened, in other words, at the Preliminary Hearing to prejudice the defendant's trial?

A The widow was especially distraught. She had just come from her husband's funeral the day before. She was brought into a tiny courtroom where there was one black man sitting at the defense table. The prosecutor walked over to him and pointed to him and said, "Is this the man that did it?"

She looked him straight in the eye and said, "That's the man that did it"—over vigorous objection of Defense Counsel Hill.

Mrs. Turman is a very, I thought, honest witness and honest person. I do believe that had she not seen Darden until the day of the trial, if she didn't recognize him, she would have said something. She should not have been able to see Darden prior to [152] trial. Neither should Phillip Arnold—the two eyewitnesses.

Q Was there some discussion about a lineup being organized and arranged?

A If there was, I was not a party to it. I believe Mr. Darden insisted on a lineup earlier. I was not involved. I do not know the answer to your question.

Q Now, at trial you indicated there were certain deficiencies—if you will, for lack of a better term—in the defense effort on Darden's behalf.

What in particular would you cite as examples?

A The main thing was an inability to control Darden, himself. He insisted that he was going to take an active part in the trial. And in hindsight, I look back upon it, and it's my opinion that had we not allowed Mr. Darden to say anything to the jury, the results might have been different.

I think, in other words, if I tried this case again, Mr. Darden would not testify. And essentially, what we needed was an attorney who would tell him, "You're not going to testify."

And that's an attorney with a good deal of experience in capital cases.

Q In other words, part of the problem was the lack of a strong, vigorous advocate to put the defendant [153] in his proper place?

A Either that or lack of rapport with the defendant.

Q What about the closing argument of the State—what was the posture of the defense counsel as to that argument, and why were there no objections made?

A There was an objection. I did object.

Q At what point was that?

A After it was way too late, I agree. By that time we had had Norman White, Assistant State Attorney, who made an opening and closing argument. He told the jury that he would go to his death believing Willie Darden guilty of first degree murder—to his grave, I think, was the term he used.

Blatent violation, and no objection was made to that.

Then Ray McDaniel stood up and made a most effective, emotional closing argument, indicting the Department of Corrections and Darden, which can only be described as inflammatory.

There was no effective objection to that and at no time was there a motion for mistrial.

Q Was that failure to object, no motion for mistrial, a tactical decision? Or based on something else?

[154] A I cannot speak for Mr. Goodwill and Mr. Darden. With respect to myself, there was no objection because I was not aware that it was objectionable.

Q Is that what you were referring to when you testified earlier as to lack of knowledge?

A I was mostly referring to my lack of knowledge of criminal law.

Q As to lack of mitigation, what were you referring to, Judge Maloney?

A No mitigation was offered in the Darden case, with the exception of Mr. Darden, himself, testifying. I believe that that's true—I may be incorrect on that.

That decision was made after a perusal of the mitigating circumstances in the Florida Statute 921.141. And we reached the conclusion that Mr. Darden did not qualify for any of the mitigating circumstances.

We were operating on the premise at that time that we were limited to those mitigating circumstances. At least I was completely unaware that any mitigating circumstance, if relevant, is admissible.

Something should have been offered in mitigation. In any capital case such as this, something can be offered in mitigation.

Q Would it be fair to say that you and co-counsel were using 921.141—I believe it's Subsection B, [155] Mitigating Circumstances—as being a closed shop? That that was all you could consider in the way of mitigating circumstances and nothing outside the four corners of the statute?

A Until the Supreme Court ruled in Gardner vs. Florida, that was my opinion. And Gardner vs. Florida considerably postdated this trial.

Q Okay. But that was what you were all thinking on that day—

A Yes, sir.

Q —on January 19th, 1974.

A Yes, sir.

Q Did you in fact talk with Darden about mitigating circumstances? —Either within or without the four corners of this mitigating circumstance section of 921.141.

A I do not know.

Q Okay. So you all didn't try to arrange any mitigating case on behalf of Mr. Darden? Or did you?

A We certainly went through the mitigating circumstances in 921.141, and I believe we came to the conclusion that there were no mitigating circumstances and no evidence was presented.

Q Okay. Did you go over with Darden, though, and try to explain to him what the statute involved [156] and see if he qualified for any mitigating circumstances and see if you could build a mitigating case to present?

A I have no recollection of speaking to Mr. Darden about that.

Q Okay. How long was your break between the guilt phase and the penalty phase?

A I do not know. Judge Dewell told us that we could have what time we felt was necessary. And I know that it happened shortly after the verdict guilty. I do not know how long.

Q You did not ask for a twenty-four hour continuance or a delay of that sort?

A No, sir.

Q Okay. I understand at one point during the course of the trial a continuance was ordered for one day.

A Yes, sir.

Q Do you recall that?

A Yes, sir.

Q And I believe that the record reflects that it's been a part of these proceedings and your prior testimony indicates that it was due to the illness on the part of lead counsel, Mr. Goodwill.

A Yes, sir.

Q And I believe that the record also reflects [157] that that illness was in part due to voluntary intoxication on the part of Mr. Goodwill; is that right?

A He was intoxicated on the night before.

Q All right. Would you explain the circumstances as you know them to be involving that sequence of events and Mr. Goodwill.

Q Are you referring specifically to the conversation with Judge Dewell or something—

Q Well, I would like, first, what you know about the incident, itself, and the subsequent ruling by the Court, and I'm going to ask further questions about what was conveyed to Defendant Darden.

So, first, what information—what specifically is the information you had or know about the incident involving Mr. Goodwill causing a continuance due to his voluntary intoxication?

A I believe the continuance was on Wednesday of that week. At approximately four o'clock in the morning Mr. Goodwill got back to the motel that he and I were sharing in Inverness—or in New Port Richey or wherever we were staying.

I had been asleep for some time. Mr. Goodwill turned on the light and told me to get up, that we were going to start preparing for trial.

We had an argument about that.

[158] Q Was he apparently or obviously intoxicated at that time?

A He was obviously intoxicated at that time.

Q And could you tell by what means he was intoxicated? Was it alcohol as opposed to some other inducement?

A It appeared to be like alcohol.

Q Okay.

A We argued about that matter, and I insisted that I was not going to get up at four o'clock in the morning and start preparing for trial, and went back to bed.

He then put all of his books on the table and commenced preparation for the trial, and fell asleep in his chair.

I got up and turned off the lights and went back to bed. I got up the next morning, got ready for trial, and as I was leaving I woke him—he was sitting in the chair—I told him that I was going and that he better get going because we were running out of time.

Q At what hour was this?

A That would be approximately seven a.m. When I got to the courthouse Judge Dewell was prepared for trial and, of course, noticed that Mr. Goodwill was not present. He asked me where Mr. Goodwill was and I [159] told him that I left him in the motel room.

He then recessed to his chambers and brought the prosecutors McDaniel and White and myself in there and asked what are the circumstances. I told Judge Dewell what I knew about it.

Judge Dewell asked Mr. McDaniel, who is a good friend of Mr. Goodwill if Mr. Goodwill could function under those circumstances. Mr. McDaniel said no, no, he couldn't.

I told Judge Dewell that I was prepared and that I could continue the trial and Judge Dewell said, "No, you're not going to try this case."

And Judge Dewell, I believe, on his own motion, perhaps on mine, granted a day continuance.

Q Why did Judge Dewell refuse to allow you to proceed to try the case by yourself?

A I assume because of my inexperience.

Q Was Mr. Darden present at that hearing?

A No, sir.

Q What was the explanation given to him regarding the delay that day?

A I think we told him that Mr. Goodwill had an asthma attack. We did not tell him the truth.

Q Were psychiatric appointments arranged for him subsequently that day?

[160] A Yes.

Q And were they in fact arranged that very day?

A I believe that they were, but I am not sure.

Q Do you know who the parties were that he, Mr. Goodwill, was out drinking with that night, Tuesday night?

A I certainly do not know all of them.

Q Were there certain members of the State Attorney's office?

A That's most unlikely. I find that most unlikely.

Q Okay. But you do know certain members that he was with? Is that what you were going to say?

A He was drinking with the deputy sheriffs involved in the case.

Q Did Mr. Goodwill actually have a "problem"? By that I mean was he subject to attacks of this nature?

A I don't know.

Q Okay. You never had any experience with him before?

A No, sir.

Q Okay. Have you any other such experience with Mr. Goodwill during the course of the trial proceeding?

A Mr. Goodwill and I very quickly became [161] disenchanted with each other and spent as little possible time together. At no time did I see Mr. Goodwill intoxicated during the daytime, and I do not know how any intoxication would have affected his work on the other days of the trial.

Q Did you see him regularly during the night-time hours during the trial proceedings?

A Except for the first night, sir, we did not spend any nights together.

Q Did he on that night—did he become intoxicated?

A Not to the extent of the Wednesday morning episode, but yes.

Q To your knowledge, have there been any changes made in the office of Public Defender relating to their representation of capital cases?

A Yes, sir.

Q What has that change been?

MR. PROSPECT: Objection, Your Honor. It's irrelevant.

THE COURT: What's the relevancy of that question?

MR. HARPER: Your Honor, I have nothing further at this time.

THE COURT: Mr. Prospect, you may inquire.

[162] CROSS EXAMINATION

BY MR. PROSPECT:

Q Judge Maloney, let me get one thing straight, precisely.

At the beginning of the incident involving Mr. Darden, you were but a legal interne working for the Public Defender's office?

A Yes, sir.

Q And I believe you stated that your primary, if not your sole duty, was to assist trial attorneys.

A Yes, sir.

Q Would it be fair to say that that assistance was inwhatever form necessary?

A Yes, sir.

Q Legal aid work, perhaps?

A Yes, sir.

Q After you passed the Bar and became involved in the Darden case on a basis other than that as interne, would you please again describe precisely your involvement in the case and your familiarity with the case—with regard to Mr. Goodwill.

A I was the research assistant, so that I was in charge of doing legal research on any motions which had to be done.

I was also, I suppose, not in charge, but it [163] was my duty to complete and familiarize myself with the discovery and completely familiarize myself with potential defense witnesses.

I was assigned the responsibility of preparing and arguing the motion to strike in-court identification.

Q Did you in fact familiarize yourself with all discovery, all witnesses and with all aspects of the case?

A Yes, sir.

Q Would it be fair to say that you knew about as much—did you know as much about the case as did Mr. Goodwill?

A Yes.

MR. HARPER: Your Honor, I would object to that. It would be a conclusion on the part of the witness to purport the answer that he knew as much as some other counsel involved in the case.

THE COURT: I'll overrule the objection. He answered the question.

BY MR. PROSPECT:

Q Did you participate in the taking of any depositions of any or all witnesses?

A Mr. Prospect, I have no recollection of participating in depositions. I'm sure if the depositions are available, my name would be on it if I was [164] there. I do not recall participating in any of the depositions.

Q Were you aware who else might have taken depositions?

A That could have been any of the attorneys in the office, sir.

Q Did you become familiar with the depositions?

A I did.

Q Can you tell me what—how would you describe discovery? In other words, the discovery relationship between your office and the State Attorney's office.

A For the most part, the relationship between the State Attorney's office and the office of the Public Defender in Bartow is most cordial.

The exchange of discovery is informal and generally complete. When we are dealing with a case such as this, however, discovery was conducted under strict rules of discovery.

Q It would be incorrect, therefore, to say that it was anything even remotely close to open house.

In other words, here's my file and let me see yours. It was nothing like that?

A The rules of discovery at that time and at this time are practically open house. But I certainly can't imagine Ray McDaniel and Norm White saying, "Here's [165] my file." I recall nothing of that.

Q Very strict observance, therefore.

A In my opinion, that would be, yes.

Q How many attorneys did the Public Defender have at that time? Do you remember?

A Yes, sir. Assigned to the Public Defender, Mr. Johnson, there were three full-time attorneys and there were one—six part-time attorneys working in Polk County.

Q Of those attorneys, how many to your recollection had some input or at least involvement into or with this case?

A Certainly all of the full-time assistants, so there's four. Certainly, Goodwill is five. I know Mr. Horton is six.

I think it was a very big case, Mr. Prospect, and I think at one time or another every single attorney in that office was consulted.

Q Thank you.

Prior to trial, with the exception of what you knew you had to do, assigned duties; arguing motions, suppression of the ID and whatever other ones you may have argued, I believe I heard you say that you had no definite knowledge that you knew you had to act in any way before the jury.

[166] A That is correct.

Q So as far as you knew, going into the trial, it was strictly Mr. Goodwill.

A That is correct. I knew that there was some possibility that I would be allowed to do some work before the jury.

I had not been told pre-trial that I would do it nor was I told what I was to do.

Q Did you want to?

A Yes, sir.

Q Did you ask permission to?

A No, sir.

Q Was it perhaps a situation in which you were there to learn?

A That certainly—my primary duty was not to learn, of course; it was to assist Mr. Goodwill. But it was a learning experience.

Q Your primary duty was to assist Mr. Goodwill.

A Yes, sir.

Q You were told at what time that you would handle voir dire examination of prospective jurors?

A On the morning of the voir dire.

Q That very morning.

A Yes, sir.

Q Had you prepared to do that? Not necessarily [167] to do it—were you prepared to the extent and familiar enough with the law, that you weren't embarrassed. Were you caught short?

A Yes, sir.

Q You were caught short?

A When I was informed that I was going to do voir dire examination, I was also told that the voir dire examination had to last the entire day because the opening statement was not prepared.

Q Who informed you that it had to last the entire day?

A Mr. Goodwill.

Q What was the reason?

A The opening statement was not prepared.

Q All right. Please continue.

A As a result, I stood in front of that jury and asked repetitious questions for eight hours.

I believe I alienated the jury by so doing. That is not the way that I would—I did conduct voir dire examination in capital cases, after that case.

Q Did you learn what you wanted to know—from the jurors?

A Yes, sir.

Q You mentioned that you were familiar with the principles of Witherspoon, but you didn't know the magic [168] question to ask.

A Yes.

Q In your subsequent experiences in capital cases, did you ever ask the magic question?

A Yes, sir.

Q You did?

A Yes, sir.

Q Was Mr. Goodwill present during voir dire examination?

A Yes, sir.

Q Did he assist you in any way?

A Yes, sir.

Q How much?

A I believe he assisted me a lot. I think that before I would sit down after asking a prospective juror questions, I would go to Mr. Goodwill and ask him if there was anything I missed.

So his input was great.

Q Great?

A Yes, sir.

Q 75 percent?

A I would not feel comfortable putting a percentage on it, but I think 75 percent would be high.

Q He wasn't ever absent during voir dire examination.

[169] A I don't believe he was, sir.

Q He didn't ever tell you that you forgot to ask some things or that you overlooked some things; important?

A I don't recall directly, but it's entirely possible that he did.

Q You expressed some degree of dissatisfaction with the representation that Mr. Darden received, and I believe you mentioned pre-trial tactics and during trial tactics.

I believe also that you elaborated on that later and laid some blame at your feet in that you claimed to have had a lack of knowledge with regard to sentencing.

A Yes, sir.

Q In other words, how 921 operated in that regard.

A Yes, sir.

Q Could you describe, please, some of the pre-trial tactics that you considered less than exemplary.

A Aside from the Preliminary Hearing and the line-up matter? Is that what you mean?

Q Whatever you meant by pre-trial tactics.

A This is hindsight, of course. The fatal error—one of the major errors that was made pre-trial—was the demand for change of venue. We should [170] have never left Polk County.

Q Did you make that?

A I believe Mr. Darden filed that initially.

Q Was he represented by counsel when he made that?

A Yes, sir.

Q He was represented?

A Mr. Prospect, it's difficult to say he was represented at one time, and then he was not represented and then he was represented, again. We were never completely off the case. The only question was whether we were in an advisory capacity or whether we were trial counsel.

Q Wasn't the motion for change of venue ultimately granted?

A It was.

Q And is it not true that apparently someone or everyone had second thoughts and tried to get it changed back?

A That is true.

Q So an effort was made to try to have trial remain in Polk County.

A That is true.

Q Any other pre-trial tactics?

A Offhand, Mr. Prospect, I can't think of any.

[171] Q Well, sir, is tactic a fair word? How about just procedure? Was there any procedure, pre-trial, that didn't meet with your muster? Either then or now, as you view it.

A Including the Preliminary Hearing?

Q Yes, sir, everything pre.

A It is very difficult for me to say, well, if I had it to do again, I would file this motion and not file that motion. The primary thing, in a case such as this, is that a very good attorney—the best attorney—must be assigned to the case as trial counsel the day you're appointed.

The best attorney takes the capital cases from Day One, he calls the shots. That is not the way that Mr. Darden's representation was handled, and I think that that is the thrust of the pre-trial problems.

Q That there was not one attorney from Day One all the way through.

A That is correct.

Q Are you familiar with the motion to dismiss the indictment by the defense attorney?

A Yes, sir.

Q Did you have any input into that?

A I believe, sir, that the motion to dismiss the indictment, if I could see it, was a form motion drafted [172] by the Public Defender's office in Sarasota. If I could see the motion, I could tell you, but I do not know.

Q Do you remember, without having to see it, do you remember essentially the thrust of it, sir?

At the very least, I would put the trial judge on notice that my client and I weren't getting along and then pretty much throw the burden on to the trial judge.

Q Can you conceive of a situation where a defendant would get along with no attorney.

A Absolutely.

Q You did not know that anything that Ray McDaniel was saying in closing argument was objectionable?

A I know that sounds comical, but that is true.

Q What makes you believe that it was objectionable?

A It was intentionally inflammatory, it was irrelevant, it was an expression of his personal opinion.

Q You believe that now?

[176] A Yes, sir.

Q Even in light of Darden vs. State?

A Particularly in light of Darden vs. State.

Q In other words, you sat there, you heard the man make his argument, but you just did not know it was objectionable. It was inflammatory, but you didn't realize. Is that perhaps a better statement?

A I realized that it was inflammatory. I realized that it was detrimental to our case.

I did not know that it was objectionable, legally. I did not know that it called for an objection and a motion to dismiss.

Q But you did object.

A I think that if you look at the transcript, my objection is not specific. I think that I simply asked Judge Dewell to tell Mr. McDaniel to stop suggesting that my client should be sitting here with no face because Mr. Turman shot it off with a shotgun.

Q Would it refresh your memory if I tried to paraphrase that part of the testimony?—To the effect that Mr. McDaniel made a statement that you considered not a part of the evidence. That was your first remark.

And your second remark was, "Your Honor, I believe that is the fifth time that Mr. McDaniel has called my client an animal."

[177] Does that refresh your memory in that regard?

A It does, Mr. Prospect. I believe that is correct.

Q So apparently his reference, whether it was bypassed or not, to Mr. Darden as an animal was at least something that caused you to feel it was objectionable, whether it was inflammatory or prejudicial.

A Yes, sir.

Q Thank you.

When did you find out that in the State of Florida a capital defendant can present any non-statutory mitigating circumstances provided that it's relevant?

A I realize that I just said Gardner vs. Florida, but that is not the case. Gardner vs. Florida deals with presentence investigations shown to defense counsel.

The case that apparently amplifies Florida Statute 921 in that regard is out of the state of Ohio, a woman sentenced to death.

I do not recall the name of the case.

Q How about Lockett v. Ohio, this year?

A Yes, sir.

Q How about Cooper vs. State in this state, about four years ago? Are you familiar with that case?

A I am familiar with Cooper. I'm trying to—would you relate to me what the Court held in Cooper?

[178] Q Practically, if I may—now, now you're testing me—the same thing as in Lockett.

In other words, it approved the introduction of mitigating evidence that was not statutorily listed. But, in any even, was it Lockett or was it Cooper the first time that you knew you could do that?

A I certainly stand to be corrected by the Court or Mr. Harper, but I don't think Cooper stood for that position.

Q Okay.

A Lockett is the first time that I found out from the United States Supreme Court that mitigating circumstances were not limited to the enumerated mitigating circumstances.

In fact, the United States Supreme Court in Proffitt suggests that Florida be allowed to introduce evidence.

Q Yes, sir.

A There is really no basis for that suggestion by the Court.

Q Thank you. —But in any event you did not know at that time.

A I did not know.

Q Wbat, sir, relevant evidence would you have introduced if you had known that you could have? [179] Relevant evidence.

A At this time, Mr. Prospect, I don't know.

Q All right. Do you remember how many witnesses that you were—to hear you tell it—suddenly told that you had to cross examine?

A No, sir, I don't. I think that the record will reflect that; I don't know.

Q How does five sound?

A That sounds accurate, sir.

Q Edith Lee Hill? John Daniel Stone?

A Miss Hill—Mr. Stone identified Darden as getting out of the car, I think, and throwing something into the bushes; is that correct?

Q All right. Let's start.

Edith Lee Hill. How about the lady who saw the automobile leaving the back of the furniture store?

A I do recall her testimony. I do not recall whether I did the cross examination.

Q All right. Mr. Stone was the man—

A He was coming home from the beach and saw the automobile accident and saw Mr. Darden throw—

Q Mary Simmons?

A What did she say?

Q I believe the lady who helped give Mr. Darden a ride.

[180] A Yes.

Q Sammy Taylor?

A Polk County Sheriff's Deputy?

Q And Eugene Mezger.

A Pathologist.

Q Pathologist. Cause of death?

A Yes.

Q Okay. Were you aware that three of the five were listed as defense witnesses?

A I was not aware of it until you just mentioned it.

Q Would it surprise you, sir, if you looked over the record, that Edith Lee Hill was asked fifty questions on direct examination and you asked forty-nine?

Mr. Stone was asked fifty-three on direct, and you asked seventy.

And Mary Simmons was asked twenty-nine and you asked seventy-nine.

And Sammy Taylor was asked nine by the State and you asked eight.

And the pathologist was asked thirty by the State and twelve by you.

Would you agree, if my figures are correct and my arithmetic accurate, that that at least would indicate that you were anything but prepared for [181] these witnesses?

A It would appear that I was prepared.

Q Was Mr. Goodwill present?

A I'm sure that he was.

Q At all times.

A I believe that he was.

Q Do you recall whether you may have consulted with him during your cross examination of these witnesses?

A I feel confident before I would have stated no further questions, I would have asked Mr. Goodwill if I missed anything.

Q Of these witnesses, which were State witnesses would you consider any of them as giving damaging evidence in support of the State's charge?

A Yes, sir.

Q Who might they be?

A The first lady—

Q Edith Lee Hill?

A I have not reviewed the transcript. I'm taking this from memory from January of 1974.

I believe this lady said that she saw the gold and green Chevrolet pull out of there. "I saw a black man driving it at such-and-such a time."

Q That's all; right?

[182] A Yes, sir.

Q What about Mr. Stone?

MR. HARPER: Your Honor, the witness hasn't finished answering the question before counsel is changing the subject. I object at the interruption.

THE COURT: Mr. Maloney, were you interrupted?

THE WITNESS: Yes, sir.

THE COURT: Objection sustained.

MR. PROSPECT: I apologize.

THE COURT: Answer the question, please.

A (Continuing) The lady put Mr. Darden at the scene of the crime. The lady put the car—she identified the car as going out there. It was wrecked a mile or so down the road. She said it looked like the same car, she wasn't a positive ID. But it certainly was relevant, which is why Judge Dewell allowed it in.

She identified the driver as a black man, alone. I think she said all of that.

And the other gentleman was driving his family home from the beach and he said he saw this car drive off the road. He said the car was going at an excessive rate of speed, in a rainstorm, drove off the road, and then he saw the driver get out of the car and tuck his shirt into his pants, consistent with the right theory, and I believe he also said he saw him toss something [183] into the bushes, consistent with Deputy Sheriff Weatherford's testimony that they found a revolver which was linked as the murder weapon.—In the general vicinity of the accident.

I found his testimony very damaging.

Q This is a man that you listed as a defense witness?

A Yes, sir.

Q What about the pathologist? Anything incriminating on behalf of your client?

A I don't think so.

Q The same for Mary Simmons?

A Well, she definitely put Mr. Darden at the car at the proper time. I don't think that her testimony was particularly detrimental. I don't recall exactly.

Q How did you plan to use John Daniel Stone and Mary Simmons in support of an alibi?

A Yes, sir.

Q So, you really wanted them to put him there, where they put him, did you not?

A No, sir, I did not.

Q You did not.

A We did not use a defense of alibi.

Q No; had you planned to?

A Yes, sir.

[184] How do you know that Mr. Goodwill was out drinking with the deputy sheriffs?

A It was common knowledge.

Q How did it become common knowledge? How did you know, sir? Common what? Every night he drank with the deputy sheriffs?

A No, sir. I mean, the persons who were involved in the trial, the prosecutors, myself and the deputy sheriffs were all aware that this was going on.

Q Rumor? As far as you were concerned?

A No, at least on one occasion, Goodwill told me that he had been out with them and they were discussing the case.

Q On one occasion Goodwill had told you that he had been out with one of them, meaning the deputy?

A That he had been out drinking, that he had discussed the case. And the reason it was brought up—the pistol, the revolver was relevant.

Q Excuse me. Just answer my question. He told you that he had been out with the deputy, drinking.

A Yes, sir.

Q Was that drinking episode the same one which you referred to in direct testimony?

A I do not know if that was the same one. I doubt it.

[185] Q My question is, how do you know, of personal knowledge, that the night you say his condition necessitated a continuance the following day at trial, that he was out drinking with deputies? Did you see him?

A No, sir.

Q When was the last time you saw him, after you left the courtroom? Did you both return to the motel?

A I'm sure that we did, yes, sir.

Q And you went your way and he went his.

A Yes, sir.

Q And the next time you saw him was at four in the morning.

A Yes, sir.

Q He appeared to be drunk to you.

A Yes, sir.

Q Was he falling down drunk? Speech slurred?

A Yes, sir.

Q Loud?

A Yes, sir.

Q State of disarray?

A I don't recall that.

Q And he wanted to wake you up to start working on the case—preparing for trial.

A Yes, sir.

[186] Q What stage of the trial was that?

A We had selected the jury on Monday and there had been opening statements and I think a few witnesses on Monday. We were approaching the critical stage of the trial.

Q You had an argument that morning, early that morning?

A Yes, sir.

Q And after the argument, you went back to sleep and left him sitting in the chair working on the case?

A Yes, sir.

Q He fell asleep, and you went back to bed. When you woke up, did you try to wake him?

A I did.

Q Then you dressed and got ready for trial.

A Yes, sir.

Q Kind of abandoned him; did you?

A I don't really know what more I could have done. I woke him up in time to get ready to be there.

Q Did anything occur during the trial that caused you to dislike Mr. Goodwill? Did you ever butt heads over a tactical decision or a direction that the trial should take—prior to this incident?

A I don't recall any, sir. We were not in a posture of equal. I was not in a position really to [187] argue as an equal with Mr. Goodwill about trial and pre-trial tactics. I would make suggestions.

Q You did have inputs?

A Yes.

Q Were any of your suggestions accepted?

A I feel sure that they were, but I do not know.

Q Any rejected?

A Again, I feel sure that they were, but I cannot specifically say.

Q Well, if you think that they were rejected, do you think you may have resented that?

A I don't think I resented that, Mr. Prospect. I certainly became resentful of Mr. Goodwill's behavior after the first day of the trial—and I think that's what you're getting at.

And, yes, we were not on speaking terms, if you will, except in the courtroom after the first day.

MR. PROSPECT: Thank you. I have nothing further, Your Honor.

THE COURT: Mr. Harper.

REDIRECT EXAMINATION

BY MR. HARPER:

Q If it please the Court—Mr. Maloney, you said you became resentful of Mr. Goodwill's behavior after the first day of the trial. What do you mean by [188] that, sir?

A I mean like doing the voir dire examination. I got up in the morning and he simply told me, "You're going to do voir dire examination." And this was just too big a case, in my opinion, for that. And I didn't like it.

Q When you say the word "resentful," what do you mean by that word—the use of that word? Do you mean you felt hostility toward Mr. Goodwill or do you mean that you just had lack of respect for his judgment?

A It's difficult to say. I cannot honestly say that I did not have hostility toward Mr. Goodwill. I didn't—I certainly wasn't overwrought by his trial ability.

Q Did your resentment carry over and color your testimony and perspective and objectivity on the stand today?

A No, sir.

Q Now, did Mr. Goodwill in his assistance to you on voir dire explain to you the words of art in preserving a Witherspoon objection and Witherspoon qualification of a juror?

A Well, I had read Witherspoon. I don't think Mr. Goodwill explained it to me.

[189] Q So he didn't advise you about the proper Witherspoon procedure then; is that right? You learned it on your own? Or what you knew, you learned on your own?

A What I knew, I learned on my own. I think the record will show that I asked for a challenge for cause—I don't recall exactly.

Q Okay. Now, during the cross examination by Mr. Prospect you were questioned and answered something about the revolver, and then another question was asked and you went on.

Do you remember what the rest of your answer was concerning that revolver?

A I think that Mr. Prospect had asked whether the gentlemen who was driving home from the beach said anything detrimental. And I think the main thing that he said was that the individual had gotten out of the car and thrown something into the bushes; something was the revolver.

The revolver became relevant—well, it was the correct caliber for one thing, but ballistics could not match it up. It was the correct caliber.

But what it had that was peculiarly relevant was the firing pattern of the bullet. It matched exactly with the testimony of the State witnesses with [190] reference to the shot fired, blank, shot fired, shot. I felt that the revolver was very damaging evidence.

Q Is this the critical stage of the trial which you were referring to at which Mr. Goodwill bowed out, so to speak?

A I don't recall that, sir.

Q What was it? You indicated that you were approaching the critical stage of the trial, what was it that you were referring to?

A In my opinion, the critical stage of that trial would have been the testimony of Phillip Arnold and the testimony of Mrs. Turman. I do not know whether the continuance preceded that testimony or was after that testimony. I'm sure the record would reflect.

Q Now, as a Judge of the Polk County Court, you have had an opportunity to see people drunk or who are intoxicated; haveyou not?

A Well, I don't think I have as a Judge, no, sir.

Q Have you had experiences with people who have been intoxicated? Either professionally or personally?

A Yes, sir.

Q On numerous occasions?

A Yes.

Q Is there any doubt in your mind that Mr. Goodwill was intoxicated on the morning causing the [191] continuance of the trial?

A No, sir.

Q Now, an allusion was made that you abandoned Mr. Goodwill. Was that what in fact what you did, slipping off and leaving him and getting him in dutch with the Court?

A No, sir.

Q What was your effort and your desire in that area in waking up Mr. Goodwill that morning? What was it that you were trying to do?

A I woke him up and told him I was leaving. He knew where he had to be.

Q You indicated that you were not equal in responsibilities, I assume as being trial counsel. Is that what you were referring to?

A Yes, sir.

Q Did Mr. Goodwill look down upon you as a "new boy on the block," so to speak? Or look at you with that type of skin as a new attorney, as opposed to an experienced advocate and proponent?

A I do not recall Mr. Goodwill ever looking down upon me; no, sir.

Q Counsel went over the fact that you asked numerous questions on cross examination. Does that fact possibly indicate that you needed to familiarize yourself [192] with the witness's testimony?

A It is my opinion that I was prepared for those witnesses.

Q I show you the record, Page 35, 36, 37, 38, 39, 40 and 41, and ask you if you can recognize the motion to dismiss?

A Yes, sir, I recognize it.

Q Is that in fact the form motion from the Sarasota Public Defender's office that you indicated you used?

A Yes, it is. The motion was filed and--

Q This, of course, being the first; is that correct?

A Yes, sir.

Q Now, you indicated that there was not one counsel appointed to go all the way through the case and that the Public Defender's office was on the case, off the case and in an advisory capacity all the way through.

At what point did you know for certain that the Public Defender's office was going to actually be trying the case of the State of Florida vs. Willie Jasper Darden, as opposed to him trying it himself or some other private counsel being appointed?

A I would not be comfortable putting a date on [193] that. The trial was in January. I feel certain that it was some months before that.

Q Do you know when in your mind when you were going to be involved as co-counsel in the trial?

A As far as actually going to Inverness, I don't think that that decision was made certainly no more than two weeks before the trial.

MR. HARPER: That's all I have, Your Honor.

THE COURT: Mr. Prospect.

MR. PROSPECT: Thank you, Your Honor.

RECROSS EXAMINATION

BY MR. PROSPECT:

Q Since you've had a chance to quickly look over the motion, did it refresh your memory as to its length and context and substance?

A Other than what I said initially, sir, I don't really think that—

Q Well, would you share the opinion that it was a pretty good motion?

A It was an excellent motion.

Q Fairly innovative?

A A brilliant, brilliant work.

Q Brilliant work.

A Yes, sir.

Q Do you think it would be a good ideal for an [194] office handling its first capital case to have one attorney to stay with it all the way? Or would it perhaps would it be better to share some of the experience of all of the attorneys in the office, if it was the first one?

A I think that certainly the experience of all the lawyers should be used in a case such as this and a first case.

I believe an attorney should have been appointed to represent Mr. Darden from Day One.

Q Did anybody in the office that you know of have capital case experience?

A Mr. Leroy Horton was the Public Defender and had been the Public Defender for a number of years before Mr. Johnson. It is possible that Mr. Horton tried capital cases; I do not know.

Q Mr. Leroy Horton—Leroy Horton?

A Yes. Now, if you were to say so-and-so had tried capital cases, I couldn't disagree with you. But I did not know anybody that did—this is before, you know, before Furman.

Q Before Furman.

A Right.

Q Did the penalty change before Furman or after Furman?

[195] A Well, prior—The procedure changed, the penalty did not change.

Q Well, before or after, the death penalty was still a possibility; right?

A Yes, sir.

Q Thank you.

Did Mr. Goodwill's intoxication render him incompetent?

A No, sir.

Q What prejudice occurred by the continuance of one day?

A I do not know that any prejudice occurred, sir.

Q Then it wouldn't have been any different if Mr. Goodwill had come down with some malaise of some sort.

A I do not know that, sir.

Q I think you said it, but I sure would like to get it repeated, if I could. Did you ever have any indication or any reason to believe that Mr. Goodwill was intoxicated or had been drinking during the trial?

A I never had the slightest indication that he had taken a drink.

MR. PROSPECT: Thank you. No further questions, Your Honor.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 79-566 Civ.T.-H

UNITED STATES OF AMERICA
EX REL. WILLIE JASPER DARDEN, PETITIONER

vs.

LOUIE L. WAINWRIGHT, Secretary, Division of Corrections, State of Florida, RESPONDENT

REPORT AND RECOMMENDATION

A state prisoner, Willie Jasper Darden, under sentence of death for murder brings this habeas corpus action attacking his conviction and his sentence on numerous grounds. After consideration of the state court records [1] and the evidence adduced at an evidentiary hearing,[2] and the extensive memoranda filed by the parties, I have concluded that two of petitioner's claims merit habeas corpus relief. After careful consideration of the remaining twenty-four claims, I find that they are without constitutional merit.[3]

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[1] Reference to the trial transcript shall be designated herein: T-.

[2] Reference to the evidentiary hearing shall be designated herein: H-.

[3] In light of the ultimate recommendation that habeas corpus relief be granted, the twenty-four meritless claims will be treated in summary fashion in this report.

BACKGROUND

On the evening of September 8, 1973, Mrs. Helen Turman was alone in her furniture store located in Lakeland, Florida. Sometime between 5:00 p.m. and 6:00 p.m. an individual came to the store and asked to look at some furniture and furnishings. After looking at a few items, the individual left, indicating that his wife would be in to the store. Sometime later, the same individual returned to the store, this time asking to look at ranges and stoves. While Mrs. Turman was figuring out the price of the items, the individual pulled a gun and demanded the contents of the cash register. It was at this point that Mrs. Turman's husband, Carl, unexpectedly walked into the store. The assailant responded to this interruption by shooting Carl Turman between the eyes at close range. The body dropped in the doorway, halfway in the store and half out.

With Mr. Turman lying dead or dying on the floor, the assailant ordered Mrs. Turman to get down on the floor. He then demanded that she remove her false teeth and perform oral sex on him. When she protested, he ordered her to stand up, and began walking her to the front of the store. A teenaged neighbor and parttime employee of the Turmans, Phillip Arnold, having heard the commotion arrived at the store at this time. Not realizing what was going on, Phillip attempted to move Mr. Turman's body all the way into the shop. As the teenager bent over the body, the assailant shot him in the mouth. As the youth attempted to flee, he was shot in the neck and then in the side.

A short time later, some three miles from the site of the murder, assault and robbery, petitioner Willie Jasper Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he had been driving, and smashed into a telephone pole. Petitioner left the scene and returned to Tampa where he spent the night. He was initially arrested and charged

with leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery, and assault with intent to commit rape. The grand jury returned indictments charging first degree murder, robbery and assault with intent to commit murder in the first degree. At all times petitioner has maintained that he was not present at the Turman's store and is innocent of the charges.

Both before and during trial, petitioner was identified as the assailant by Helen Turman and Phillip Arnold, eye-witness victims of the criminal episode. The trial jury found petitioner guilty of murder in the first degree, assault with intent to commit murder in the first degree, and robbery. After the second phase of the bifurcated trial, the jury recommended the imposition of the death penalty. After enumerating its findings of aggravating and mitigating circumstances, the trial court sentenced petitioner to death by electrocution.

POST-TRIAL HISTORY OF THE CASE

Petitioner took a direct appeal of his conviction to the Supreme Court of Florida. On February 18, 1976, the court affirmed the judgments and sentences. *Darden v. State*, 329 So.2d 287 (Fa. 1976). The Supreme Court of the United States granted petitioner's writ for certiorari on November 1, 1976, *Darden v. Florida*, 429 US 1036 (1977) on the sole issue of whether the prosecution's summation to the jury in the circumstances of this case deprived petitioner of due process of law, and thereafter dismissed the writ as improvidently granted on April 19, 1977. *Darden v. Florida*, 430 US 704 (1977).

Petitioner's sentence was the subject of a clemency hearing on March 30, 1978, and again on May 8, 1979. Petitioner filed a lawsuit in the Second Judicial Circuit, in and for Leon County, Florida, *Darden v. Graham*, et al, case no. 79-1193, seeking injunctive and declaratory

relief with regards to the result of the clemency proceeding. Pursuant to Defendant's Motion to Dismiss, the Complaint was dismissed with prejudice on May 16, 1979. The Governor then signed Petitioner's death warrant on May 18, 1979, and on May 21, 1979, the Supreme Court of Florida affirmed the trial court's dismissal of May 16. *Darden v. Graham*, case no. 56,877.

Petitioner then filed two actions: (1) the habeas corpus petition which is the subject of the instant case, and (2) a Motion to Vacate, pursuant to Fla. R. Crim. P. 3.850, and a Motion for New Trial, pursuant to Fla. R. Crim. P. 3.600 (filed in the original action in this cause, *State of Florida v. Darden*, case no 73-2027-C). A hearing was held on both motions on May 21, 1979. A motion to secure the presence of Darden at the hearing was denied and all motions on the merits, including a motion for stay of execution, were denied. (Court Exhibit No. 3) On May 22, 1979, the Supreme Court of Florida affirmed the order of the trial judge and denied yet another application for stay of execution. *Darden v. State*, case no. 56,910.

In his initial Petition for Writ of Habeas Corpus, filed with this Court, petitioner alleged two grounds:

(1) The prosecutor's closing argument was so fundamentally prejudicial and unfair that it deprived him of due process of law;

(2) The pre-trial identification of him by the victim's wife was so impermissibly suggestive that its admission into evidence deprived him of due process of law. (This claim was withdrawn and abandoned. Pretrial Stipulation Paragraph 3 b)

Based upon a review of the petition and the materials attached, this Court found that petitioner's constitutional assertions "were not facially frivilous in any sense, but indeed present substantial claims," and stayed petitioner's execution.

By means of interrogatories propounded to petitioner on July 3, 1979, respondent was able to ascertain that

petitioner was also alleging the following constitutional claims in support of his petition for habeas corpus relief:

1. The execution of the petitioner's death sentence would violate the Eighth and Fourteenth Amendments of the Constitution of the United States because that sentence was imposed pursuant to a pattern of arbitrary and capricious capital sentencing;

2. Petitioner's execution would constitute excessive punishment in violation of the Eighth Amendment and a deprivation of life without due process of law under the Fourteenth Amendment because the justifications asserted to support the death penalty are factually insufficient to warrant the invasion of the fundamental right to life;

3. The death sentence imposed upon the petitioner constitutes a cruel and unusual punishment forbidden by the Eighth Amendment in that it constitutes the unnecessary infliction of physical and psychological pain and torment;

4. Petitioner has been sentenced to die in violation of the Equal Protection clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of racial discrimination in capital sentencing;

5. Petitioner has been sentenced to die in violation of the Equal Protection Clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of discrimination against poor persons in capital sentencing;

6. Petitioner has been sentenced to die in violation of the Equal Protection Clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of inflicting capital punishment upon male offenders, and sparing similarly situated female offenders, on the sole ground of their respective sexes;

7. The death sentence imposed upon the petitioner constitutes cruel and unusual punishment forbidden by the Eighth Amendment because, considering all of the

relevant circumstances of the offense and the offender, it is grossly disproportionate and excessive;

8. The death sentence imposed upon the Petitioner is inappropriate, improper and illegal because considering all of the relevant circumstances of the offense and the offender and the sentence imposed in comparable cases it is disproportionate, excessive and unwarranted;

9. Petitioner's death sentence was imposed in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because he was sentenced to die following a trial at which he was denied, solely because of his poverty, a fair opportunity to prepare and present evidence as to why the death sentence should not be imposed. For the same reason the sentencing jury was deprived of evidence indispensable to the rational determination of penalty, and the death penalty imposed on the petitioner is accordingly a cruel and unusual punishment forbidden by the Eighth Amendment;

10. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that were fundamentally unfair in that petitioner was not given adequate notice and an opportunity to present evidence and argument addressed to the specific issues that the sentencing authority considered determinative of the question of life or death;

11. The execution of the petitioner's death sentence will deprive him of life without due process of law, and will deprive him of the equal protection of the laws, in violation of the Fourteenth Amendment, because that sentence was reviewed and affirmed by the [Florida] Supreme Court pursuant to procedures that (A) were fundamentally unfair, in that the petitioner was denied notice and an opportunity to be heard regarding the "similar cases" that the [Florida] Supreme Court compared with his as the basis for its "proportionality review," and (B) denied the petitioner on the sole ground of his indigency, access to facts regarding "similar cases"

which a death-sentenced defendant with adequate means could have presented to the [Florida] Supreme Court as the grounds for reducing his sentence from death to life imprisonment;

12. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that were fundamentally unfair in that the petitioner was denied timely notice of, and a fair opportunity to prepare to meet, prejudicial evidence that was presented at his penalty trial.

13. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that permitted a sentence of death to be rendered based upon facts that were not established beyond a reasonable doubt;

14. Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth Amendment, and was imposed in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it was based upon proceedings in which the prosecutor was permitted to urge a death sentence upon grounds that were couched in inflammatory argument of the prosecuting attorney and improper professional conduct;

15. Petitioner's death sentence was imposed and affirmed in violation of the Sixth and Fourteenth Amendments because he was denied the effective assistance of counsel at the penalty stage of his capital prosecution;

16. Petitioner's conviction and sentence of death deprive him of the equal protection of the laws of his life without due process of law, in violation of the Fourteenth Amendment, because he was convicted and sentenced to die following a trial at which he was denied, solely because of his poverty, a fair opportunity to prepare and present his defense to the capital charge against him;

17. Petitioner's death sentence was imposed in violation of the Fifth, Sixth and Fourteenth Amendments, with the purpose and effect of penalizing the exercise of

rights secured by those Amendments, in that it was imposed pursuant to a pattern and practice of the prosecuting and judicial authorities of the County of Polk, Tenth Judicial Circuit of State of Florida to reserve the sentence of death for capitally-charged defendants who refuse to plead guilty and thereby to waive their Fifth Amendment right to trial and their Sixth Amendment right to trial by jury;

18. Petitioner's conviction and death sentence were rendered in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because he was indicted by a grand jury, and was convicted and sentenced to die by the recommendation of a petit jury, that were selected through procedures which systematically excluded racial minorities from jury service;

19. Petitioner's death sentence is a cruel and unusual punishment and deprives him of life without due process of law because it was imposed pursuant to the recommendation of a jury selected through procedures that systematically excluded from jury service persons having conscientious or religious scruples against capital punishment;

20. Petitioner's death sentence was imposed in violation of the Sixth Amendment because it was imposed pursuant to the recommendation of a jury from which persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross section of the community;

21. The execution of the petitioner's death sentence would deprive him of life without due process of law, and of the equal protection of the laws, in violation of the Fourteenth Amendment, because the procedures used in the consideration and denial of his application to the Office of Executive Clemency for commutation of that sentence were fundamentally unfair, irregular and arbitrary;

22. The execution of the petitioner's death sentence would deprive him of the equal protection of the laws

guaranteed by the Fourteenth Amendment, because the State of Florida was denied and denies the petitioner, solely on account of his poverty, opportunities for commutative relief against that sentence which are available to death-sentenced prisoners who have the financial means to afford them;

23. The execution of the petitioner's death sentence would deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment because he was legally incompetent and the State of Florida has denied him, solely on account of his poverty, opportunities available to death-sentenced prisoners who can afford them, to show that he was legally incompetent to be put to death;

Petitioner also filed a Supplemental Petition for Writ of Habeas Corpus, September 12, 1979, in which he added a claim of ineffective assistance of counsel. This brought the total number of the claims being alleged by petitioner to twenty-six. Respondent has raised no objection to the inclusion of these additional claims, and has also waived any claim that petitioner has failed to exhaust state court remedies as to any claim presented. Therefore, all twenty-six claims are now properly before this Court. However, as noted above, the claim relating to pre-trial identification has been withdrawn, leaving twenty-five claims for further consideration.

INFLAMMATORY ARGUMENT OF THE PROSECUTING ATTORNEY AND IMPROPER PROFESSIONAL CONDUCT.

In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may 'strike hard blows' but not 'foul ones.' *Berger v. United States*, 295 U.S. 78, 88 (1935); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). If

> that safeguard fails, review remains available under due process standards. *United States v. Ash*, 413 U.S. 300 (1973), 320.

Petitioner contends that remarks made by the assistant state attorneys during closing arguments were so prejudicial to his cause as to constitute a denial of his right to due process. The majority opinion in the Florida Supreme Court decision, although affirming petitioner's conviction and sentence, recognized that ". . . the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility. . . ." *Darden v. State*, 329 So.2d 290 (Fla. 1976). Respondent's Supplemental Answer, at page 12, recites that "No one has ever even weakly suggested that McDaniel's closing remarks were anything but improper. . . ."

The improper statements of the prosecution can be placed in four general categories:

(1) statements by the prosecution attempting to try petitioner for "offenses" of the State Division of Corrections;

(2) statements of the prosecution seeking to prejudice the jurors by improperly appealing to their emotions;

(3) statements of the prosecution which improperly placed the prosecutors' personal credibility in issue;

(4) other forms of improper argument.

THE OBJECTIONAL ARGUMENT

I

As examples of statements by the prosecution attempting to try petitioner for "offenses" of the State Division of Corrections, the record discloses the following excerpts from the prosecutor's jury argument:

> As far as I am concerned, there should be another Defendant in this courtroom . . . and that is the division of corrections, the prisons. (t. 749)

* * * *

As far as I am concerned . . . this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking? (T. 749)

* * * *

I wish that person or persons responsible for him on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold]. Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. (T. 750-751).

Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it. (T. 752).

* * * *

There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections. (T. 764)

* * * *

I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you. (T. 782)

The prosecutor, Mr. McDaniel, engaged in a line of argument to draw the jury's attention to an issue wholly immaterial to the determination of petitioner's guilt or innocence, as exemplified by the following comments:

> That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend. (T. 753-754)

II

Statements of the prosecution seeking to prejudice the jurors by improperly appealing to their emotions include the following:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [petitioner] sitting here with no face, blown away by a shotgun but he didn't. . . . I wish someone had walked in the back door and blown his head off at that point. (T. 758-759)

Mr. McDaniel returned to this theme when he described the five times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Darden] didn't get a chance to use it. I wish he had used it on himself." (T. 774) He made a similar comment in describing Petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (T. 775) Finally, while discussing the claim that Petitioner had changed his appearance between the date of the crime and that of the trial, Mr. McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his

throat." (T. 779) An additional comment in the same vein occurs at T. 775, when the prosecutor stated "And Darden saved one [bullet]. Again I wish he had used it on himself."

III

The personal credibility of the prosecutors was placed in issue through comments such as these:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. (T. 748)

Mr. McDaniel, the lead counsel for the prosecution, repeatedly offered the jury his opinion that Petitioner was not a man worthy of belief. Since Petitioner's defense consisted largely of his own alibi testimony, the prejudice from such remarks is manifest.

Petitioner testified that he had asked for the lie detector test. In discussing that testimony, Mr. McDaniel said: "I don't believe anything he says. . . ." (T. 770) Petitioner testified that his alibi was the truth. Mr. McDaniel attacked this testimony in the following way: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out;" (T. 755) and "The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time." (T. 755-756) This was an obvious reference to Petitioner.

Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of

the crime. Mr. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week." (T. 769) Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance—testimony that was confirmed by one of the state's own witnesses. Yet Mr. McDaniel discounted Darden's testimony and said: "That's what he says. I don't know that he stopped at any. . . . I guarantee you he was not going back to the scene of the accident until he had gotten home." (T.777-778) In addition to telling the jury that he thought Petitioner a liar, Mr. McDaniel also suggested in a thinly veiled way that he knew of other instances where Petitioner had shot people: "Darden doesn't like people who move after he shoots them in the mouth." (T. 761)

IV

Other improper forms of argument were presented by the prosecution before the jury. Mr. McDaniel began his argument by telling the jury in effect that it should pay no attention to the argument of defense counsel that would follow because all defense lawyers always made the same arguments:

> Now [defense counsel] and I am positive, and I assure you and I guarantee you that [defense counsel] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because has notes I gave him many years ago. (T. 749)

Mr. McDaniel discussed Petitioner's statement that he would take a lie detector test if his attorney were present. Mr. McDaniel told the jury:

> Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that. (T. 770)

Mr. McDaniel also made repeated reference to aspects of Petitioner's conduct while on weekend furlough from prison that were entirely unrelated to the offenses with which he was charged. (T. 751, 763, 766)

Throughout the entire closing arguments of both prosecution attorneys, only two objections were ever raised by defense counsel. The first occurred when the prosecution suggested that Petitioner's girl friend, knowing that he was a criminal, allowed him to bring a gun into her house while he was on weekend furlough. (T. 751) No specific ruling was made on the objection, but the comment was not stricken. The second objection raised by defense counsel was in response to the prosecution's comment that the only thing Petitioner had not done to alter his appearance was to cut his throat. (T. 779) Defense counsel noted that it was the fifth time the prosecution had commented that he wished someone would have shot Petitioner, or that Petitioner would have killed himself. The court overruled the objection. (T. 780)

In *Darden v. State*, 329 So.2d 287 (Fla. 1976), the Supreme Court of Florida considered Petitioner's contention that remarks made by the assistant state attorneys during closing arguments were so prejudicial to his cause as to require the granting of a new trial. After a thorough examination and evaluation of the language being complained of by Petitioner, the Court concluded, however, that when the "totality of the record" was considered, the remarks of the Prosecutor amounted to harmless error.

STANDARD OF REVIEW

In a leading case on the question of whether a federal prosecutor's courtroom statements violated a defendant's right to due process or constituted prejudicial error depriving him of a fair trial. *Berger v. United States*, 295 US 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), the Supreme Court of the United States said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger* at 88.

The much later case of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974), involved a federal habeas corpus proceeding brought by a state prisoner who alleged that the statements of the prosecutor during his state court trial violated the due process clause of the Fourteenth Amendment. The Supreme Court indicated that the scope of review in such a case would be the narrow one of due process "and not the broad exercise of supervisory power that it would possess in regard to its own trial court." *Donnelly* at 642. In determining that Petitioner had shown no prejudice amounting to a denial of constitutional due process, the Court took note that the challenged statements constituted only a brief moment in the prosecutor's long argument, that there was neither the introduction of specific misleading evidence important to the prosecution's case in chief nor the nondisclosure of specific evidence valuable to the accused's defense and that the trial court, on the defendant's request, had instructed the jury to disregard the prosecutor's statement.

In addition, several other factors have been considered by the Supreme Court in evaluating whether a prosecu-

tor's remarks made to, or in the presence of the jury, have constituted prejudicial error in depriving a defendant of due process, or his right to a fair trial. These considerations include the relative strength of the government's case against the defendant, whether the prosecutor's remarks were made in response to defense counsel's statements to the jury, whether defense counsel raised any objection to the complained of remarks, the prosecutor's intent and whether the prosecutor retracted the remarks.

I

BRIEF EPISODE OR PERSISTENT ERROR

In determining whether a prosecutor's statements in his argument to the jury constituted prejudicial error, the courts have taken note of whether the statements were but a brief episode in a long summation or whether the statements were repeatedly made. In *United States v. Socony-Vacuum Oil Co.*, 310 US 150, 60 S.Ct. 811, 84 L.Ed. 1421 (1940), the Court found that although the statements of the prosecution were improper, they were "minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice," *Socony-Vacuum* at 240, and did not constitute prejudicial error.

Likewise, in *Donnelly v. DeChristoforo*, *supra*, the Court reasoned that the prosecutor's comment "was but one moment in an extended trial," *Donnelly* at 645, and did not violate the Defendant's right to due process. The same reasoning was followed by the Fifth Circuit Court of Appeals in *Alvarez v. Estelle*, 531 F.2d 1319 (5th Cir. 1976), when it found that the single remark of the prosecution, when considered in the context of the entire trial, did not render the proceedings fundamentally unfair.

On the other hand, in circumstances where the prosecution's misconduct was pronounced and persistent, the courts have found that such comments had a probable cumulative effect on the jury, and thus resulted in prejudicial error. *Berger v. United States*, *supra*; *Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978).

Two recent Fifth Circuit Court of Appeals cases, *Cronnon v. Alabama*, 587 F.2d 246 (5th Cir. 1979); and *Cobb v. Wainwright*, 609 F.2d 754 (5th Cir. 1980) merely mention the repeated comments of the prosecution in passing. Although factually distinct from each other, the court concluded in each case that the petitioner had not been denied due process.

II

MISLEADING ARGUMENT OR FAIR SUMMARY

The courts have examined complained of prosecutorial statements to determine whether these statements amounted to the introduction of specific misleading evidence important to the prosecution's case in chief or the nondisclosure of specific evidence valuable to the accused's defense. In cases where the courts have found that neither of the above occurred, the courts have concluded that no denial of due process occurred. *Donnelly*, *supra*; *Cobb*, *supra*.

Conversely, when the courts found that the prosecutor had misstated facts, put words into the mouths of witnesses, cross-examined witnesses after deliberately misconstruing their testimony, assumed prejudicial facts not in evidence, *Berger*, *supra*, knowingly misled the jury and court about the significance of crucial evidence, *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 609 (1967), and implied that a defendant in a drug case was giving out names of drug traffickers to his attorney during the course of the trial, *United States v. Corona*, 551 F.2d 1387 (5th Cir. 1977), the courts found that the substantial rights of the defendant were prejudiced.

III

PERSONAL OPINION OR OPINION BASED ON EVIDENCE

In cases in which the prosecutor's remarks were found to have been made in response to the defense counsel's

statements to the jury, it was determined that the prosecutor's statements to the jury did not violate the defendant's right to due process. In *Socony-Vacuum*, *supra*, the Supreme Court rejected the defendant's contentions that various statements of the prosecutor about his belief in the defendant's guilt and the government's desire for a conviction, constituted prejudicial error. The Court ruled that the statements were not prejudicial since the statements concerning the Government's wish to have the defendants convicted were made in response to defense counsel's repeated statements to the jury as to the knowledge and acquiescence by government officials in the defendants' conduct. *Socony-Vacuum*, at 241-242.

In *Del Cristo v. United States*, 327 F.2d 208 (5th Cir. 1964), the court found that the defendant was not denied a fair trial because the prosecutor in his summation to the jury said he believed the defendant to be guilty. The court determined that the argument of the defense that the prosecuting attorney did not believe that the defendant was guilty, but was merely doing his job, had provoked the retort from the prosecutor concerning his belief in the guilt of the defendant.

IV

PURPOSEFUL AND FLAGRANT OR FAIR COMMENT

In reviewing whether a prosecutor's courtroom remarks constituted prejudicial error, the courts have given consideration to whether the prosecutor's conduct was either purposeful or flagrant. *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1964). In *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973), the court found that the prosecution's inaccurate suggestion that the defendant would be free to walk the streets if the jury found him unable to stand trial, was deliberate and calculated to influence the jury in its decision making. *Bruce* at 1040. Accordingly, the court concluded that the

defendant's right to a fair hearing on the merits of the case had been infringed upon.

Similarly, in *Kelly v. Stone*, 514 F.2d 18 (9th Cir. 1975), the Court found that the prosecuting attorney's statement to the effect that perhaps the next time the victim wouldn't be "a little black girl from the other side of the tracks; maybe it will be somebody that you know," constituted a highly inflammatory and wholly impermissible appeal to racial prejudice. Likewise, the court found that:

> The district attorney's peroration that 'If you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home . . .' was not only a highly improper expression of personal opinion but constituted a veiled threat to the jury to return a guilty verdict. *Kelly* at 19.

The Court concluded that the cumulative effect to these improper comments and inflammatory statements made by the prosecuting attorney during argument to the jury operated to deny the black defendant a fair trial on rape charges.

V

WEAK CASE OR STRONG CASE

In determining whether improper remarks made by the prosecution constituted prejudicial or reversible error, one of the factors considered by the courts has been the relative strength of the case against the defendant. A review of relevant cases indicates that prejudice to the defendant was found when the case was a "weak" one as opposed to a "strong" one.

In *Berger, supra*, in reversing the defendant's conviction, the Court in evaluating the prosecutor's statements, noted that the case against the defendant was not strong, but might "properly be characterized as weak," and "in these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming

its non-existence." *Berger* at 89. On the other hand, in *Socony-Vacuum*, *supra*, the strength of the government's case was one of the factors relied on by the Supreme Court in holding that the prosecutor's remarks, although improper, did not constitute prejudicial error. *Socony-Vacuum* at 299. The Court distinguished the decision in *Berger*, *supra*, in which the case against the defendant had been weak. *Id.*

In its opinion in *Cronnon*, *supra*, the Fifth Circuit Court of Appeals noted that although the language used by the prosecutor was strong, it was completely in accord with the evidence in the case. *Cronnon* at 251. Additionally, the concurring opinion took note of the fact that "the proof against the defendant was overwhelming." *Id.* at 252. And, in *Cobb*, *supra*, the Fifth Circuit found:

> Given the circumstances of this case, we conclude, and *our conclusion is made easier by the strength of the evidence against Cobb*, that no prejudice amounting to such a denial of constitutional due process was shown. *Cobb* at 756. (Emphasis added)

VI

OBJECTION MADE OR FAILURE TO OBJECT

A factor sometimes considered when the prejudicial or nonprejudicial effect of a prosecutor's comments is determined is whether an objection was made to the comments by defense counsel. In *Berger*, *supra*, *Corona*, *supra*, and *Houston*, *supra*, where the prosecution had made several comments which were objected to by the defense, the respective courts found that the defendants' rights had been prejudiced.

In *Cronnon*, *supra*, the court found that the Petitioner had not suffered a deprivation of due process. The concurring opinion points out that no objection was made to the prosecutor's closing argument. *Cronnon* at 252.

VII

Various courts have considered the effect of curative instructions sought by defense counsel as the result of improper comments of the prosecutor. In *Socony-Vacuum*, *supra*, and *Donnelly*, *supra*, it was held that under the particular facts obtaining (in each case the comment of the prosecutor was deemed to be but an isolated comment), the prosecutor's courtroom remark did not constitute a violation of the defendant's right to due process.

However, when the prosecutor has engaged in persistent and pronounced misconduct, the courts have indicated that instructions by the trial court directing the jury to disregard the prosecutor's improper remarks, were not sufficient to cure the error. *Berger*, *supra*; *Houston*, *supra*.

VIII

REMARKS WITHDRAWN,
CURRATIVE INSTRUCTIONS

In *Socony-Vacuum*, *supra*, where the defendant's conviction was upheld, one of the factors relied on by the Supreme Court in holding that the prosecutor's remarks to the jury did not constitute prejudicial error was that the prosecutor withdraw his remarks after the defendant had objected thereto. *Socony-Vacuum* at 242. And in *United States v. Rodriguez*, 585 F.2d 1234 (5th Cir. 1978), the Fifth Circuit noted that the jury instructions given by the court may be considered as a factor in assessing the degree of prejudice sustained by a defendant because of improper comments by the prosecution. *Rodriguez* at 1244.

IX

The above enumerated specific factors have been considered by the Supreme Court and the Fifth Circuit Court of Appeals in evaluating whether a prosecutor's remarks made to, or in the presence of the jury, have constituted prejudicial error depriving a defendant of due process, or

his right to a fair trial. The Supreme Court has given specific guidelines to be applied in arriving at a proper determination of the prejudicial effect on the jury, if any, resulting from trial errors.

The methodology for determining if the effect of trial errors on the trial jury was harmless or prevented defendant from receiving a fair and impartial trial is found in *Kotteakos v. United States*, 328 US 750 (1945).

> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. Cf. *United States v. Socony-Vavuum Oil Co., supra*, at 240-242. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. *Kotteakos*, at 762.
>
> * * * *
>
> Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus, it is not the Appellate court's function to determine guilt or innocence. *Weiler v. United States, supra*, at 611; *Bollenbach v. United States*, 326 U.S. 607, 613-614. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error. *Weiler v. United States, supra, Bollenbach v. United States, supra.*
>
> But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of

the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. *United States v. Socony-Vacuum Oil Co.*, *supra*, at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men; not on one's own, in the total setting. Cf. *United States v. Socony-Vacuum Oil Co.*, *supra*, at 239, 242; *Bollenbach v. United States*, *supra*, 614.

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others *might* react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm, or a specific command of Congress. *Bruno v. United States*, *supra*, at 294. *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or*

if one is left in grave doubt, the conviction cannot stand. Kotteakos, at 763-765. (Footnotes deleted, emphasis added)

The Kotteakos "harmless error" test was cited in a Fifth Circuit opinion determining that prosecutorial misconduct denied defendant a fair trial in *United States v. Haynes*, 466 F.2d 1260 (5th Cir. 1972) and forms the basis for the "harmless error" constitutional rule announced in *Chapman v. California*, 386 U.S. 181 (1967). *Chapman* rejects any "overwhelming evidence" test.

SUMMARY

The Darden trial jury was subjected to numerous instances of prejudicial prosecutorial argument as above detailed. The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eyewitness testimony of the victims. All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony. Defense counsel's objection to the prosecutor's argument was late and tentative. The trial judge overruled the objection thereby making it appear that the argument could be properly considered by the jury.

The question which then must be asked is: In the context of the entire trial did the prosecutor's improper arguments either have a substantial influence on the jury's determination of guilt, or is there grave doubt about what influence the argument did have on the jury? Petitioner's trial counsel put in issue the credibility of the victims' identification by cross-examination and proper jury argument. Darden's testimony at trial included a denial of the offenses of an alibi, testimony which "appeared on its face to be sincerity." (Trial Judge's Findings of Fact For Sentence.)

In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was prejudiced against Darden by the argument. The State has failed to demonstrate, beyond a reasonable doubt, that the prosecutor's comments did not contribute to Darden's convictions, a burden mandated by *Chapman v. California*, *supra*. The argument was so egregious that the trial judge should have reprimanded the prosecutor and instructed the jury to disregard the improper remarks, even without objection of the defense counsel. The one effective objection was overruled and the judge thereby magnified the prejudice, leading the jury to believe that it was proper to consider the prosecutor's argument in determining the verdict. The horrible, heinous, repulsive nature of the crimes involved does not expiate the prejudicial effect of the prosecutors' argument in this case. To hold otherwise would eliminate any prosecutorial restraint and deny a defendant, in a case like the present one, a fair trial on a presumption that any prosecutorial misconduct, however egregious, is harmless where the crime is shocking and there would be sufficient evidence to convict if the misconduct had not occurred. The errors here were not harmless when viewed in light of the teachings of *Kotteakos* and *Chapman*, *supra*.

Although the Florida trial judge imposes the death penalty, and may do so notwithstanding a jury recommendation of life imprisonment, the jury recommendation is given great weight. In order to impose the death penalty following a recommendation of life, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

. . ." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). See also: *Burch v. State*, 343 So.2d 831, 834 (Fla. 1977). Darden was entitled to a fair trial on the issue of guilt and an equal measure of fairness at the sentencing phase, untainted by prejudicial argument of the prosecutor.

In making this recommendation, I am aware that the decision of the Florida Supreme Court in *Darden v. State* is due that deference required by Title 28 U.S.C. § 2254 (d) as interpreted in *Sumner v. Mata*, —— U.S. ——, 101 S.Ct. 764, 28 Cr.L. 3061, decided January 21, 1981. Section 2254(d) relates to the factual determination made by the Florida court on appeal, which historical facts are not in dispute. Here and in that court the same record is reviewed. The ultimate determination of whether the prosecutor's prejudicial remarks denied petitioner a fair trial is a mixed question of fact and law. To the extent it is considered a factual determination, I conclude that the record, considered as a whole, does not fairly support a determination that Darden's trial was a fair trial. Considered as a determination of the appropriate legal resolution of the historical facts found, applying the federal constitutional standards herein set forth, I find that the Florida Supreme Court was in error in the fair trial standard it utilized and the results reached. That court summarized its standard for review as follows:

> "How is it possible to use language which is fair comment about these crimes without shocking the feelings of any normal person? The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes." *Darden v. State*, 329 So.2d 329, 290.

The answer, of course, is that even a person charged with the most heinous crimes is entitled to a fair trial, not a perfect trial but a fair trial.

> We are mindful of the fact that federal courts do not sit as courts of errors and appeals when a state

> prisoner seeks federal habeas corpus. At the same time, we cannot ignore our responsibility to insure that an accused obtains a fair trial by an impartial jury. As the Supreme Court has reiterated time and time again, "[e]xercise of calm and informed judgment by . . . [a jury's] members is essential to proper enforcement of law." Highly prejudiced remarks uttered by the prosecutor jeopardize the jury's deliberative process and hence infringe upon an accused's right to a fair hearing on the merits of the case. *Bruce v. Estelle*, 483 F.2d 1031, 1040 (5th Cir. 1973). (Footnotes deleted.)

The prosecutor struck foul blows, and there is grave doubt that the jury was not influenced by these foul blows. Accordingly, I find that Petitioner was denied his right to due process.

MISCELLANEOUS DEATH PENALTY CLAIMS

Most of Petitioner's additional claims, asserted after the filing of the original petition in this cause, relate to the application of the death penalty statute, Florida Statutes § 921.141. Except as otherwise specifically treated in this report and recommendation, the claims asserted lack sufficient merit to afford Petitioner habeas relief.

Petitioner's contentions that excessive punishment, cruel and unusual punishment, discrimination in punishment related to race, poverty, and fundamental unfairness mitigate against imposition of the death penalty are issues settled against Petitioner in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) and *Proffitt v. Forida*, 428 U.S. 242 (1976).

Arbitrary sexual, racial and poverty related patterns of sentencing are alleged by Petitioner, but no proof was offered to support these contentions. In an opinion striking down the Massachusetts death penalty statute, the Supreme Judicial Court of that state recites that "The criminal homicide data from the date of the post-Furman

statutes through 1977 indicate . . . [that] (i)n Florida, of 286 blacks who had killed whites, forty-eight (16.8%) were sentenced to death: of 111 whites who killed blacks, none were sentenced to death." *District Attorney v. Watson*, Mass. Sup. Jud. Ct., 10/28/80, 28 Cr.L. 2172. Petitioner, in the instant case, has failed to establish any such statistics showing a suspect pattern of sentencing. In any event, it is doubtful that such statistics, standing alone, would warrant habeas relief without a review of each case included in the statistical summary.

CLEMENCY PROCEEDINGS

Petitioner claims that he was denied due process in relation to the clemency proceedings. Whatever procedure Petitioner may suggest is unfair, irregular or arbitrary, there has been no showing of prejudice to Petitioner in the clemency proceedings. Nor is there any proof that Petitioner's poverty "denied him an equal opportunity to establish that he was denied an opportunity for commutative relief or opportunity to establish that he was legally incompetent to be put to death."

I find no legal authority contrary to Justice England's concurring opinion in *Sullivan v. Askew*, 348 So.2d 312, 316-319 (Fla. 1977), wherein England stated:

> Nothing yet said by the United States Supreme Court suggests that the discretionary decision whether or not to allow a judicially approved death sentence is subject to the same due process strictures as are required for any judicial process employed to impose such a sentence. . . . further . . . I would not engraft these due process requirements on the clenency powers conferred in Florida's Constitution . . . *Sullivan* at 319.

DEATH PENALTY REVIEW

In *Tedder v. State*, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court gave assurance that it would re-

view all death penalty cases to assure an even-handed application of the death penalty and to insure that the death sentence would not be "wantonly" and "freakishly" imposed. That assurance was accepted by the Supreme Court in *Proffitt v. Florida*, 428 U.S. 242 (1976), as satisfying the requirement that the Florida death penalty statute would be applied in a non-discriminatory fashion and not in an arbitrary or capricious manner.

The Florida Supreme Court performs this review function by comparing the facts and circumstances of each case with those of other cases in which the death penalty is imposed. *Malloy v. State*, 382 So.2d 1190 (Fla. 1979). For a detailed discussion of the procedure followed by the Florida Supreme Court, see: *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981). Pursuant to the provisions of 28 USC, Supreme Court Rule 22, Petitioners have until mid-April, 1981 in which to file a petition for writ of certiorari to the Supreme Court of the United States. An example of the Florida Courts' difficulty in performance of this task is evident in the dissenting opinion in *Malloy v. State*, *supra*, at 1193. See also: Concurring Opinion in *Godfrey v. Georgia*, —— U.S. ——, 100 S.Ct. 1759, 1980. Performance of the review function by the Florida Supreme Court was criticized by Justice Marshall in the dissenting opinion in *Gardner v. Florida*, 430 U.S. 349, 365 (1976), in which he stated that "the blatant disregard exhibited by the (Florida) courts below for the standards devised to regulate imposition of the death penalty calls into question the very basis for this Court's approval of that system in Proffitt." The majority, however, excused the Florida Court's review performance because *Proffitt* and *Tedder* were decided after the Florida Supreme Court *Gardner* decision. *Gardner*, *supra*, 361 n.12.

Petitioner claims that the review function performed by the Florida Supreme Court does not "assure that the death penalty will not be imposed in an arbitrary or capricious manner" as required in *Proffitt*, *supra*. In sup-

port of this claim, Petitioner, on November 15, 1979, filed an affidavit of the Clerk of the Florida Supreme Court, establishing that the Florida Supreme Court does not take into consideration sentencing factors in those capital trials which result in life imprisonment rather than the death penalty. A contention that such cases should be included in the review process was raised and rejected in *Proffitt*, *supra*, 259 n.16. Petitioner has submitted no proof other than this affidavit, and in light of the precedent of *Proffitt*, this claim must be denied.

THE WITHERSPOON PROBLEM

Petitioner alleges that the jury which convicted him and recommended the death penalty failed to include a true cross-section of the community because prospective jurors were improperly excluded based solely on their religious or conscientious scruples against the death penalty, in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Five veniermen were excused for cause: Mr. Varney, Mr. Mays, Ms. Carn, Ms. Maher and Mr. Murphy. Each was excused for cause after expressing his opposition to the death penalty. It is now clear that exclusion of even one venireman on grounds at variance with the *Witherspoon* standard will void the death sentence even though the state may have one or more unexercised preemptory challenges. *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979); 626 F.2d 396 (5th Cir. 1980); *Alderman v. Austin*, 498 F.Supp. 1134 (S.D. Ga. 1980); *Davis v. Georgia*, 429 U.S. 122 (1976); *Adams v. Texas*, —— U.S. ——, 100 S.Ct. 1521 (1980). A general inquiry into personal, conscientious scruples against capital punishment cannot form a permissible basis for exclusion from a jury deliberating the life or death fate of another human being.

> It cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples'

> against the infliction of the death penalty or against its infliction 'in a proper case' thereby affirms that he could never vote in favor of it or that he would not consider doing so in a case before him . . . Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed. *Witherspoon v. Illinois*, 391 U.S. 510, at 515 n.9 (citations omitted).

Such exclusions are constitutionally permissible only if veniremen make

> "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon v. Illinois*, *supra*, 391 U.S. at 522-23 n.21 (emphasis in original), reiterated in *Adams*, 100 S.Ct. at 2525 and *Burns*, 626 F.2d at 398.

We need to go no further than to review the voir dire examination of Mr. Varney and Mr. Murphy to see that at least two prospective jurors were excused for holding views about capital punishment not shown to be sufficiently unbending to meet the standards of *Witherspoon*.

On the issue of prejudice against the death penalty the trial judge's cursory examination of Mr. Varney follows:

> THE COURT: All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty *you would be unwilling* under any circumstances to recommend the death sentence? (Emphasis added)
> MRS. MACY: No, sir.
> THE COURT: Do you, Mr. Blankenship?
> MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?
MR. PELELLAT: No, sir.
THE COURT: Mrs. Spike.
MRS. SPIKE: No sir.
MR. VARNEY: Yes sir.
THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be *unwilling* to return such a recommendation because of your conscientious beliefs?
MR. VARNEY: *I believe I would.* (Emphasis added)
THE COURT: All right, sir. You will be excused.
MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.
THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service. (T. 44-45)

Mr. Murphy's examination was nearly as abbreviated as Mr. Varney's. The equivocal question to Murphy evoked an equivocal answer. The following colloquy ensued with juror Murphy:

CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is your occupation?
MR. MURPHY: Retired.
THE COURT: What did you do prior to retirement, sir?
MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.
THE COURT: What seminary were you with, sir?
MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be *unable without violating your own principles* to vote to recomend a death penalty regardless of the facts? (Emphasis added.)
MR. MURPHY: Yes, I have.
THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

CLERK: Cecelia Clark Mulroy. Number 85.
THE COURT: Mrs. Horne, you will note the defendant object (sic) to him being excused for cause. (T. 165).

The fact that Mr. Varney "believed" that he would be "unwilling" or "unable" to recommend the death penalty because of his conscientious beliefs does not foreclose the possibility that despite his expressed convictions he could put his disbelief or unwillingness aside and do his duty as a citizen. His answer might have been that he could. Unfortunately, as in *Davis v. Georgia*, *supra*, the hard question was not asked. Likewise, Mr. Murphy's expression of moral, conscientious or religious principles which would be violated by recommending capital punishment does not foreclose the same possibility that he could put aside these principles and do his duty as a citizen. These responses failed to demonstrate "unambiguously," *Witherspoon*, 391 U.S. at 516 n.9, or "unmistakably," 391 U.S. at 522 n.21 that Varney and Murphy would have automatically voted against a recommendation of capital punishment, or that they would not make an impartial decision as to the guilt or innocence of Petitioner. The beliefs about capital punishment expressed by these two venirement would not necessarily lead them to "ignore the law or violate their oaths." *Adams v. Texas*, *supra*. More was required than these tentative, initial, expressions of doubt as to their ability to recommend the death

penalty in order to make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed. Their excusal was erroneous under *Witherspoon*, *Burns* and *Adams*, *supra*.

Respondent, in a one sentence argument, contends that *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) and/or *Proffitt v. Florida*, 428 U.S. 242, included claims identical to Petitioner's *Witherspoon* claim and that the claim was rejected in those cases. (Respondent's Supplemental Memorandum of Law, page 4.) *Spinkellink*, *supra* at 592 cites voir dire examination of two excluded veniremen who both stated unambiguously that they could fairly judge Spinkellink's guilt but made it unmistakenly clear that they would automatically vote against the imposition of capital punishment without regard to the evidence. Although the reported decision in *Spinkellink*, *supra*, at page 592, recites that the transcript of the voir dire examination of the two excluded veniremen is "set forth in Appendix A," that appendix is not included in the published decision. I have reviewed that transcript. A reading of the Spinkellink jury voir dire examination reveals that two veniremen, excluded for cause, Mr. Ferrell and Mr. Colson, were clear and unambiguous in their determination not to impose the death penalty under any circumstances. Another venireman, Mr. Minatee, although initially expressing opposition to the death penalty was ultimately seated on the jury after further examination established that he could and would vote for capital punishment in a proper case. With that record before the *Spinkellink* court it was clearly no violation of *Witherspoon* to exclude the two veniremen for cause. In *Proffitt*, *supra*, the Supreme Court did not address any *Witherspoon* claim. Neither case cited by the Respondent represents authority for rejection of Petitioner's *Witherspoon* claim.

Witherspoon and the related cases discussed above establish a basis for vacating the death sentence but none

of these decisions suggests that the conviction must also fail. To the contrary, the *Witherspoon* opinion, where half of the panel had been excused because of their opposition to capital punishment, expressly refuses to vacate the conviction. See also: *Burns, supra; Alderman, supra;* and *Brown v. Estelle, supra.* In the instant case Petitioner has made no claim that the *Witherspoon* violation should result in vacation of the jury's verdict of guilt, but *Witherspoon* requires vacation of the death penalty.

ASSISTANCE OF COUNSEL

In further support of his application for habeas corpus relief, Petitioner WILLIE JASPER DARDEN alleges as one of his claims that the assistance of court appointed defense counsel was so ineffective as to deny him the due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States and to deny him his right to counsel as guaranteed by the Sixth Amendment of the Constitution of the United States. Petitioner has enumerated twenty-seven factual contentions as the basis for this claim.

REVIEW STANDARDS

There is a presumption that counsel has rendered legally effective assistance. *Thomas v. Wyrick*, 535 F.2d 413 (8th Cir.), *cert. den.* 97 S.Ct. 178, 429 US 868, 50 L.Ed.2d 148 (1976). A habeas corpus petitioner challenging the effectiveness of the assistance of his counsel has the burden of establishing that the performance of his counsel fell below the acceptable standards. *Id.*

The Sixth Amendment of the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In *Powell v. Alabama*, 53 S.Ct. 55, 287 US 45 (1932), with specific reference to capital cases, the Court indicated that this Constitutional guarantee contemplated "effective" counsel.

A leading Fifth Circuit case on what constitutes "effective" counsel is *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960). In that case, the court said:

> "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." *MacKenna at 599.*

[See also *United States v. Gray*, 565 F.2d 881, 887 (5th Cir. 1978); *Lovett v. Florida*, 627 F.2d 706 (5th Cir. 1980)].

In the recent case of *Knight v. Florida*, —— So.2d ——, Opinion of February 24, 1981, the Supreme Court of Florida adopted the following four principles as a standard to determine whether an attorney has provided reasonably effective assistance to his client:

> "First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurable below that of competent counsel. . .
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. . .
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. . ."

At the time the petition for habeas corpus relief was filed in the instant case, the Fifth Circuit Court of Appeals used two distinct criteria in evaluating the effectiveness of assistance rendered by retained as opposed to appointed counsel. [See: *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974); *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir. 1974)]. The recent decision of the Supreme Court of the United States in *Cuyler v. Sullivan*, 100 S.Ct. 1708, 446 US 335, 64 L.Ed. 2d 333 (1980), mandates that courts shall not use two distinct criteria in evaluating the effectiveness of assistance rendered by retained as opposed to appointed counsel. The Supreme Court stopped short of articulating what standard should now be used in determining whether counsel had been effective.

In the recent case of *Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981), the Fifth Circuit Court of Appeals adopted the following guidelines in determining whether the requirement of effective assistance of counsel has been met.

> " 'This Circuit has been strict in its requirement of the effective assistance of counsel. Effective counsel does not mean 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.' This necessarily 'involves an inquiry into the actual performance of counsel in conducting the defense . . . based on the totality of the circumstances and the entire record.' Consequently, '[o]ne may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery.' " *Beavers, supra*, 115.

A review of defense counsel's pre-trial preparation and the handling of the trial itself indicates that notwithstanding Petitioner's claim to the contrary, defense counsels' assistance was not ineffective when measured by the test articulated in *MacKenna v. Ellis, supra*. Peti-

tioner's claims concerning line-up, preliminary hearing, psychiatric examination, psychiatric evaluation, fingerprint evidence, continuance of November 1, 1973, dismissal of appointed counsel, change of venue, search and seizure, summoning of witnesses, sundry remarks of the court, motion to strike the jury panel, failure to object to the introduction of testimony, identification testimony, and miscellaneous other alleged failings of his defense counsel, even when viewed with the clear vision of hindsight, do not meet Petitioner's burden of proof necessary to establish ineffective assistance of counsel.

Based on the totality of the record and considering all of the evidence before this Court, it is clear that Petitioner's trial counsel made a substantial effort to afford Petitioner a defense to the charges upon which Petitioner was convicted. At both the pre-trial and trial stages, counsel for the Petitioner was effective in investigating and trying the case and in protecting the rights of the defendant in a professional, competent fashion. The representation, to the extent it was not perfect, in no way prejudiced Petitioner.

In light of other recommendations in this report, the only allegations of ineffective counsel made by Petitioner which will be analyzed in depth are his contentions that (1) his defense counsel failed to fully develop Petitioner's alibi defense and failed to call defense witnesses in support of Petitioner's alibi claim, and (2) defense counsel was ineffective because he failed to object to repeated prejudicial comments made by the prosecution during closing arguments. The state court trial transcript and the evidentiary hearing held in this court reveal the following facts.

ALIBI DEFENSE

Defendant claimed that he was not at the crime scene. The trial testimony of Mrs. Helen Turman indicated that the assailant entered her store between 5:30 and 6:00 P.M. (T 233),[1] and spent a total of 10 to 15 minutes in

the store. (T 266). She further indicated that she called the telephone operator to report the crimes while the assailant was still in pursuit of her neighbor Phillip Arnold. (T 242, 243)

Both Edith Lee Hill (T 291) and Phillip Arnold (T 467) testified that they thought that the shooting occurred about 6:00 P.M. John Daniel Stone testified that he was almost involved in an accident around 6:00 P.M. with a car some miles from the crime scene. It was established that Petitioner was the driver. (T 308)

Petitioner testified that right around 6:00 P.M., after the accident, he was driven to a gas station in Plant City, Florida, trying there to locate a wrecker to tow the automobile which had been involved in the accident. (T 640) Mary Simmons testified, however, that she drove Petitioner, leaving from the scene of the accident at about 6:30 or 6:40 P.M. (T 331), that they spent about 10 to 15 minutes at the gas station in Plant City, and that the trip from the accident scene to Tampa, Florida took one hour. (T 338, 340)

At the evidentiary hearing in this court, Jack Johnson, Esquire, and Raymond Goodwill, Esquire, testified concerning their research and investigation of Petitioner's alibi claim. Mr. Johnson testified that the last time anyone saw Petitioner prior to the automobile accident was around 5:25 P.M. (H 235). The Public Defenders believe that the crime had been committed between 6:00 and 6:15 P.M. (H 235) and the accident occurred between 6:15 and 6:30 P.M. (H 213) The call concerning the homocide was received by the Lakeland Police Department at 6:31 P.M. (H 235); the accident was reported to the Hillsborough County Police Department at 6:32 P.M. (H 239-240). Mr. Johnson indicated that it was the opinion of the defense that there was not a good alibi defense on behalf of Petitioner because of the gap of time between when he was last seen prior to the accident, and the time when the crime occurred. (H 232) Attempts to locate anyone who could verify Petitioner's

testimony concerning the repair of his car's muffler had been unsuccessful. (H 237)

Mr. Goodwill indicated that Petitioner did not provide the defense with any information which could account for his presence from 5:30 to 6:35 PM; (H-291) Mr. Goodwill further indicated that the evidence which was available to the defense did not preclude Petitioner from having been the assailant. (H 291).

Both Mr. Johnson, (H 239-240), and Mr. Goodwill, (H 349), were aware that the accident report was phoned in from a lounge just across the highway from the scene of the accident by an individual named "Glen." Mr. Goodwill and the Public Defender's staff did not go to the lounge in an effort to identify and locate "Glen" (H 349-350) to determine the exact time when he phoned the police after the accident had occurred. The Petitioner has offered no proof that "Glen's" testimony was essential to establish his alibi.

With regard to defense counsels' decision to call Petitioner as the sole defense witness, Mr. Johnson testified that this decision was a calculated trial tactic, planned for the purpose of giving defense counsel the final closing argument before the jury. (H 236) Having already concluded that there was no real valid alibi defense which could be made on behalf of Petitioner (H 236), defense counsel believed that presenting a poor alibi was worse than no alibi at all. (H 236)

FAILURE TO OBJECT

Defense counsel for Mr. Goodwill testified that it was a conscious, deliberate decision on his part *not* to object to the repeated, objectionable comments made by the prosecution in closing arguments. (H 333-334) Defense counsel testified that the prosecution "would get much more vehement in his remarks if you allowed him to go on, and we could always come back in with an objection later on in order to preserve it for the appeal purpose." (H 334)

In *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965), the court recognized:

> . . . the fact some other lawyer followed a different course in another case, or would have done differently had he been acting as counsel, is no ground for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. The practice of law is an art as well as a science. As no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, in the better light of hindsight. *Williams* at 706.

The Fifth Circuit Court of Appeals has repeatedly recognized that the trial tactics and strategy of an attorney, even if judged to be in error in retrospect, do not constitute a denial of effective assistance of counsel. [*Odom v. United States*, 377 F.2d 853 (5th Cir. 1967); *Daugherty v. Beto*, 388 F.2d 810 (5th Cir. 1967); *Lee v. Wainwright*, 457 F.2d 771 (5th Cir. 1972].

All of Petitioner's contentions regarding his ineffective counsel claims, including factors relevant to his alibi defense and the failure of the defense to object to the prosecution's closing argument, have been carefully considered. Evaluated in light of the cited cases, I find that Petitioner has failed to meet his burden of establishing ineffective assistance of counsel.

CONCLUSION

Willie Jasper Darden has been denied a fair trial by jury in two ways. First, the Darden trial jury did not represent a fair cross section of the community by virtue of the exclusion of jurors inclined against the death penalty but not shown to be unqualified or unable to sit and recommend such penalty in a proper case. Secondly, the Darden jury was exhorted to convict and recommend

the death penalty by emotional, irrelevant and prejudicial prosecutorial diatribes having no place in the dispassionate resolution of the question whether Darden was guilty and should receive the death penalty. Constitutional protections are not reserved for good people and denied to bad, nor does the right to a fair trial go by the board because the crimes charged are horrible to comprehend.

I recommend that habeas corpus relief be granted. If the prosecutorial argument claim is sustained Petitioner will be entitled to a new trial. If only the *Witherspoon* jury selection claim is sustained, Petitioner is entitled to vacation of the death sentence and imposition of a sentence of life imprisonment.

This 10th day of April, 1981, at Tampa, Florida.

/s/ Paul Game, Jr.
PAUL GAME, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
M. D. FLORIDA
TAMPA DIVISION

No. 79-566 Civ-T-H

WILLIE JASPER DARDEN, PETITIONER
v.
LOUIE L. WAINWRIGHT, Secretary of
Department of Offender Rehabilitation,
State of Florida, RESPONDENT

May 8, 1981

MEMORANDUM OPINION

HODGES, District Judge.

Willie Jasper Darden, a Florida prisoner under sentence of death, petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition was referred to a United States Magistrate who conducted an evidentiary hearing and subsequently rendered a Report and Recommendation that relief be granted on two grounds. The parties filed their respective objections to the Magistrate's Report, and a hearing was then conducted before me in order to facilitate the de novo determination required by 28 U.S.C. § 636(b)(1)(B) and (C). See also, Rule 6.02, M.D.Fla. Rules, and Rule 8(b)(4), Rules Governing § 2254 Cases. Upon full consideration of the Magistrate's Report, the record of the proceedings he conducted, and the case in general, I am convinced that the infirmities in the Petitioner's trial do not assume constitutional dimensions and that his petition should be denied.

I Background

Carl's Furniture Store was located in Lakeland, Florida. It was a small retail store dealing in used furniture and household appliances. The business was owned by Mrs. Helen Turman and her husband Carl. Their home was adjacent to the store, and Mrs. Turman managed the business alone while Mr. Turman held employment elsewhere.

On the evening of September 8, 1973, Mrs. Turman was the victim of an armed robbery in her store. While that crime was in progress Mr. Turman happened to enter upon the scene. He was followed a few minutes later by Phillip Arnold, a teenaged neighbor. What happened next was succinctly described by the Supreme Court of Florida in the following terms:[1]

> The record shows that Appellant first robbed Mrs. Helen Turman and that, when her unarmed husband Carl started to enter the store, Appellant shot him between the eyes scattering blood and brains. As a sixteen year old boy, Phillip Arnold, tried to aid the wounded man, Appellant shot him in his mouth, neck, and side, leaving permanent injuries, including a bullet still in his neck at time of trial. While her bleeding husband lay in a rainstorm at the door, Appellant tried to force Mrs. Turman to commit an unnatural sex act upon him at gun point. She refused, and after shooting the boy Appellant left the area.
>
> Darden was arrested and subsequently indicted for first degree murder (of Mr. Turman), robbery (of Mrs. Turman), and assault with intent to commit murder (upon Phillip Arnold). Following a change of venue to another county, the trial was held in January, 1974. In addition to circumstantial evi-

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[1] *Darden v. State*, 329 So.2d 287, 290 (Fla. 1976). The Magistrate's Report and Recommendation contains a more detailed description of the facts.

dence against him, Darden was positively identified during the trial by Mrs. Turman and Phillip Arnold. His defense was alibi, and he was the sole witness to testify in his behalf.[2]

The jury found the Petitioner guilty as charged; and, following the second phase of the bifurcated trial required by Florida Statute 921.141—the constitutionality of which has been settled by *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)—the jury recommended that Darden be sentenced to death. The trial judge than entered his independent findings concerning aggravating and mitigating circumstances, pursuant to the statute, and followed the jury's recommendation by imposing a sentence of death.

An appeal was taken to the Supreme Court of Florida which affirmed the conviction and the sentence. *Darden v. State*, 329 So.2d 287 (Fla.1976). A petition for a writ of certiorari was granted by the Supreme Court of the United States on November 1, 1976. *Darden v. Florida*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976). By order entered January 10, 1977, the Court limited the issues to be considered to the one ". . . dealing with whether the prosecution's summation to the jury in the circumstances of this case deprived the petitioner of due process of law." 429 U.S. 1036, 97 S.Ct. 729, 50 L.Ed.2d 747 (1977). Thereafter, on April 19, 1977, following oral argument, the Court entered an order dismissing the writ of certiorari "as improvidently granted." 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977). The Petitioner then returned to the State Courts[3] and, ultimately,

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[2] The Petitioner thus gained a procedural advantage afforded by the Florida Rule that ". . . a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury." Rule 3.250, Fla.Rules of Criminal Procedure, 34 F.S.A. 5 (1975).

[3] No issue is raised concerning exhaustion of state remedies, pursuant to 28 U.S.C. § 2254, with respect to any of the issues articulated in the Magistrate's Report.

to this Court seeking habeas relief after the Governor had issued a death warrant.

The Magistrate's Report recites twenty five constitutional claims being asserted by the Petitioner, but only two were found to have merit: (1) the claim concerning the prosecution's closing argument; and (2) the claim concerning *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

II The Prosecution's Closing Argument

(a) *The Supreme Court's grant of certiorari.* The principal issue raised during the Petitioner's direct appeal from his conviction—or, at least, the principal issue addressed by the Supreme Court of Florida in disposing of that appeal—concerned the inflammatory nature of the prosecution's closing argument to the jury at trial; and, as previously noted, the Supreme Court of the United States initially granted certiorari to consider that very issue. The writ was then discharged, after oral argument, as having been improvidently granted. The Magistrate did not consider or discuss the effect of the Supreme Court proceeding, and the parties have cited no authority on that point.

It is a well known rule, of course, that denial of a petition for a writ of certiorari by the Supreme Court does not constitute an adjudication.[4] But does the same result obtain upon collateral proceedings in the same case when certiorari to review a precisely articulated issue has been granted, not denied, and the writ is then subsequently discharged after oral argument? One might well suppose, at least with respect to the parties in such a case, that the discharge of the writ constituted a sufficient adjudication to preclude relitigation of that issue in collateral proceedings under 28 U.S.C. § 2254 unless the order discharging the writ expressly preserved the question. See,

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[4] *Brown v. Allen*, 344 U.S. 443, 489-497, 73 S.Ct. 397, 437-441, 97 L.Ed. 469 (1953).

for example, *Smith v. Mississippi*, 373 U.S. 238, 239, 83 S.Ct. 1265, 1266, 10 L.Ed.2d 321 (1963), in which the order discharging a writ previously granted specifically provided that such disposition was "without prejudice to an application for federal habeas corpus relief under 28 U.S.C. § 2241 after exhaustion of any state remedies still open . . ." C.f., *Shippy v. Estelie*, 440 U.S. 967, 99 S.Ct. 1519, 59 L.Ed.2d 783 (1979), and *Jurek v. Estelle*, 430 U.S. 951, 97 S.Ct. 1592, 51 L.Ed.2d 800 (1977), in which mere denials of petitions for certiorari contained similar provisions concerning habeas relief.

It does not appear, however, that the Supreme Court has delineated any distinction between the adjudicative effect of a denial and a discharge of a writ of certiorari; and, indeed, in at least one decision the Court declared that the two forms of disposition have the same inconclusive result. *Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363, 365, 93 S.Ct. 647, 650, n.1, 34 L.Ed.2d 577 (1973). See also, *Miller v. Carter*, 434 F.2d 824 (9th Cir. 1970), cert. denied, 402 U.S. 972, 91 S.Ct. 1658, 29 L.Ed.2d 137 (1971). Accordingly, until the Supreme Court holds otherwise, this Court cannot dispose of the claim concerning the prosecutor's closing argument on the ground of a prior federal adjudication inherent in the Supreme Court's discharge of a writ previously issued to consider that claim.

(b) *Wainwright v. Sykes and the lack of contemporaneous objection.* There is a second preliminary issue which must be resolved before the constitutional propriety of the prosecutor's argument can be considered on its merits. The State contends, pursuant to the decision in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that the Petitioner waived and is now precluded from asserting the claim because he did not make a timely objection during the trial as necessitated by Florida's contemporaneous objection requirement, and he has not demonstrated "cause" and "prejudice" with respect to that failure. There is, however, an

established exception to this application of *Wainwright v. Sykes*. When the State Court does not rely upon or enforce its contemporaneous objection requirement as a waiver, and proceeds to adjudicate the claim on its merits, then the federal habeas court should also reach and decide the constitutional issue presented. *Moran v. Estelle*, 607 F.2d 1140, 1141-42 (5th Cir. 1979); *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981). See also, *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

The difficulty presented by this case arises from the fact that the Supreme Court of Florida apparently disposed of the Petitioner's direct appeal on both grounds, alternatively. It first confronted and decided the fair trial issue concerning the prosecutor's argument, and then held, in the final paragraph of its opinion, that the lack of contemporaneous objection afforded an "additional" basis for denying relief, citing by footnote reference its decision in *State v. Jones*, 204 So.2d 515 (Fla. 1967).[5]

Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979), presented a similar problem. The underlying issue concerned the petitioner's claim that blacks had been

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[5] The final paragraph of the *Darden* opinion stated (329 So.2d at 291):

> Additionally, Appellant admits that his attorney voiced but a single objection to the prosecutor's closing arguments, that it was not directed to any of the allegedly inflammatory matter, and that his attorney waited until the fifth occasion to object at all. This Court has held that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made.[4]

In *State v. Jones*, a 1967 decision cited in footnote 4, the Court "recanted" an exception under which improper prosecutorial argument had been reviewed on appeal in some prior cases despite the lack of objection, and held that ". . . henceforth [the Court] will review challenged argument of prosecutors only when an objection is timely made." 204 So.2d at 519.

systematically excluded from the grand jury which indicted him. He had not objected at the time of trial and first raised the issue in post-conviction habeas proceedings in the state courts. The state trial Court held that the claim had been waived by failure to make timely objection, but also held, secondarily, that the claim lacked merit in any event. On appeal of that decision the state court of appeal merely adopted the order of the trial Court. The federal district court then denied a § 2254 petition and the case made its way to the Fifth Circuit. The Court of Appeals began its opinion by postulating the issue as follows (597 F.2d at 475-476):

> If a state court finds that a procedural default forecloses a convicted defendant's right to challenge collaterally the composition of the grand jury which indicted him, but then proceeds to consider and deny the challenge on the merits, must a federal court deny habeas corpus relief under the contemporaneous objection rule, without reaching the merits of the constitutional attack? We agree with the district court that it must.

If that resolution of the problem constituted the entirety of the Fifth Circuit's decision it would clearly be dispositive of this case; but the reasons given later in the Court's opinion cast doubt upon that conclusion. The Court said (597 F.2d at 478):

> Without written order the Texas Court of Criminal Appeals denied petitioner's application based on the findings of the trial court.
>
> It is fair to assume that the appellate court applied the procedural default rule. First, the language in the trial court opinion regarding procedural default is absolute and there is no subsequent language which would qualify or compromise it. *Second it is well settled that a court will not reach a constitutional question if it can rest its decision on non-*

constitutional grounds. Third, there is no question that the trial court correctly applied Texas law on the procedural issue.

Having decided here that the state court applied its procedural default rule and did so correctly, the federal courts must abide by that decision, cause for failure to object and actual prejudice not having been shown. The district court's dismissal of the petition for habeas corpus relief on the grand jury issue must, therefore, be affirmed. (Emphasis supplied).

Given the sequential organization of the state trial court decision placing the procedural waiver first-in-time as the primary basis of the ruling, the emphasized portion of the foregoing passage from the Court of Appeals opinion seems to indulge a presumption that the state court of appeals was content to dispose of the case on the procedural ground without reaching the issue on its merits. Hence, if that is a correct reading of the Fifth Circuit's opinion in *Ratcliff*, then the broad sweep of the first paragraph of the opinion must be restricted to the particular facts of the case, and when so restricted the decision is not dispositive of this case. Here, as contrasted with the situation in *Ratcliff*, the state court decision was rendered by the Supreme Court of Florida, the state's highest court, which clearly entertained and determined the fair trial issue on the merits as the primary basis of its decision, and the procedural waiver rationale was a secondary and alternative basis of disposition. Under those circumstances, therefore, while the Court of Appeals may ultimately decide that *Ratcliff* applies and that the Petitioner's claim concerning the prosecution's closing argument should be dismissed pursuant to *Wainwright v. Sykes* due to the lack of contemporaneous objection at trial, it behooves this court to consider the claim on its merits.

(c) *The merits of the claim.* At all stages of this proceeding the State has candidly asserted that "no one has

ever even weakly suggested that [the prosecutor's] closing remarks were anything but improper . . ."[6] And indeed they were. However, the question now to be decided is whether their probable impact upon the jury was such as to deny the Petitioner his constitutional right to due process of law by affording a trial that was fundamentally unfair. Whether an appellate court on direct appeal would ordinarily reverse a conviction under these circumstances in order to deter prosecutorial misbehavior in general and assure a fair or fairer trial is not the issue. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974); *Cobb v. Wainwright*, 609 F.2d 754 (5th Cir. 1980).[7]

The improper portions of the prosecutor's arguments may be grouped into four separate categories: (1) references to the state's Division of Corrections; (2) references to the Petitioner as an "animal"; (3) expression of personal opinion as to the Petitioner's guilt; and (4) other remarks of an inflammatory nature. It is fundamental, however, that any assessment of the effect of improper argument must be made by viewing the argument as a whole and in the context of the entire case. *Cobb v. Wainwright, supra.* In this instance, for example, it is crucial to remember that the defense gained and exercised, the right to open and close the argument or summations to the jury—the reverse of the usual sequence of argument so familiar in the federal system. This is important for two reasons. First, as will be seen, much of the prosecutor's diatribe was responsive to the opening argument of the defense; and, secondly, the defense had the "last word" in making rebuttal argument.

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[6] Respondent's Supplemental Answer quoted at page 9 of the Magistrate's Report and Recommendation.

[7] The Magistrate in his Report and Recommendation began his discussion of the issue by recognizing this important distinction (page 14), but some of the decisions he subsequently cited were rendered in direct appeals, and his analysis employed such terms as "prejudicial error" (page 17) and "prejudicial or reversible error" (page 18).

In the opening portion of his argument to the jury defense counsel [8] employed a common defensive technique and spoke at length concerning the *lack* of evidence, i.e., the absence of fingerprints or photographs of the murderer's tire tracks; and, in the jargon of trial lawyers, he generally "put the sheriff on trial." Indeed, at the conclusion of that line of argument counsel said:

> The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, *almost criminally negligent on the part of the Polk County Sheriff's Office* in this case. You could go on and on about it. (Emphasis supplied).

Under those circumstances it should come as no surprise that the prosecutor attacked that theme of the defense summation at the very beginning of his argument. He said:

> Now [defense counsel] and I am positive and I assure you and I guarantee you that [other defense counsel on rebuttal] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try [my co-counsel]. I guarantee that, because he has notes I gave him many years ago.
>
> But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as [defense counsel] said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in prison

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[8] Petitioner was represented by two lawyers throughout the trial. One of them made the opening summation and the other presented the rebuttal argument.

> when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

The prosecutor's references to the Division of Corrections was occasioned by the fact, as disclosed by the evidence, that the Petitioner was a convicted felon on week-end furlough from the state prison system at the time of the Turman murder; and the thrust of the prosecutor's opening tirade against the prison authorities was repeated from time to time as his argument progressed.[9] It is apparent in reading the arguments in their entirety, however, that the prosecutor had a dual purpose in mind when he attacked the Division of Corrections. Not only was he shifting the jury's focus away from the sheriff's office—where the defense had sought to fix it—he was also making, in effect, his principal argument in support of the death penalty.[10] This too had been invited by the

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[9] "I wish that person or persons responsible for him on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold]. Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them.

* * * *

Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it.

* * * *

There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections.

* * * *

I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you."

[10] This conclusion is buttressed by the fact that, at the conclusion of the penalty phase of the trial, the prosecutor's argument

defense. On two occasions during this opening summation defense counsel made explicit reference to the death penalty. He first remarked: "And they [the prosecutors] are asking you to kill a man on coincidence." There was immediate objection, but it was overruled. Then, at the very end of his argument, defense counsel said:

> Because, there is so much doubt here, so much unanswered with no attempt to get the answers, that you people have got to walk back in that room and ask yourselves why, why not, why didn't they give us something to work with here instead of coincidence and two people in shock. But they didn't bother to. They didn't bother, the Polk County Sheriff's Office didn't find it necessary.
>
> So they come on up here and ask Citrus County people *to kill the man.* You will be instructed on lesser included offenses. I think that you will find it rather boring. The question is, do they have enough evidence *to kill that man*, enough evidence? And I honestly do not think they do. Thank you for your time. (Emphasis supplied).

The second category of objectionable remarks made by the prosecutor involves two references to the Petitioner as an "animal." The first of those references was made near the beginning of the prosecutor's argument and is contained in the quotation on page 10, *supra*. The second use of the term "animal" by the prosecutor occurred in the following passage:

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to the jury is contained on a single page of the transcript. He said only that the prosecution was seeking the death penalty and he exhorted the jury to be attentive to the instructions of the Court. It is also pertinent to note that the first "aggravating circumstance" enumerated in Florida Statute 921.141(5), as explained to the jury by the trial judge, is:

> "(a) The capital felony was committed by a person under sentence of imprisonment."

> Some of the remarks I heard in the opening argument by [defense counsel] that I want to remember I disagree with, with his interpretation of the law. You take the law from the Judge. He said that we are asking you to kill this man on this evidence.
>
> Well, he is wrong, of course. I think he knows he is wrong. The Court will tell you at the end of the argument in the Jury instructions at this point, you are merely to determine his innocence or guilt, nothing else, whether he is guilty or innocent. And after you return that verdict of guilty of first degree murder, robbery, and assault with intent to commit murder, the Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.
>
> That is an advisory opinion on your part, and it has nothing to do with this trial, and [defense counsel] knows that. But I am sure that I want you to remember [defense counsel's] opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I will ask for the death. There is no question about it.

As is manifest from that excerpt, defense counsel had first used the term "animal," and he did so not once but twice during his argument, first near the beginning and, second, near the end of his oration: [11]

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[11] Defense counsel obviously employed the term "animal" in order to disavow any contention by the defense that the crimes committed were anything other than a vicious series of events, and to demonstrate empathy with Mrs. Turman thereby enabling counsel, and the jury, to focus dispassionate attention upon the issue concerning the Petitioner's identity as the alleged perpetrator of the crime.

> I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, *by what would have to be a vicious animal.* (Emphasis supplied).
>
> * * * *
>
> And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. Fires away, again hits him in the back, and he keeps on running. Mrs. Hill said he ran 500 yards before he collapsed in front of her house. *It's the work of an animal,* there's no doubt about it.
>
> But what about Phillip's identification? Under those circumstances, do you think it is really gotten [sic] good identification? No, it was dark. The man —Phillip Arnold, 16 years old. (Emphasis supplied).

A third challenge of the prosecutor's jury argument relates to his blatant expression of a personal opinion concerning the guilt of the accused:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

Anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility, Canon 7, EC 7-24 and DR 7-106(C)(4), could not possibly improve upon that example. Here again, however, the expression of opinion by the prosecutor merely returned a blow already struck not once but twice by defense counsel during his argument. He had said:

> [The Petitioner] was at a preliminary hearing. There were no other black men in the room. Just a question of a woman [Mrs. Turman] admittedly in shock being brought in for a ridiculous legal formality, with her sister to keep her from breaking down to get her there, bring her in, put her on the stand, and say, is this the man? Is she going to say no? *I don't think she would.* The only black man she knew and so from that preliminary hearing we get to this trial and on that identification, which *I think could easily have been mistaken,* because of the circumstances surrounding it. And go so far as to say, *in my opinion, the identification was mistaken.* (Emphasis supplied).
>
> * * * *
>
> The question is, do they have enough evidence to kill that man, enough evidence? *And I honestly do not think they do.* Thank you for your time. (Emphasis supplied).

Fourth, and finally, the prosecutor made a series of utterly tasteless and repulsive remarks such as these:

> Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance.
>
> * * * *
>
> . . . remember her testimony that he unzipped his pants, takes it out and tells the poor woman sitting on the floor to take her teeth out. I wish someone had walked in the back door and blown his head off at that point.
>
> * * * *

> That's the bullet that went in his brain. That's the one that killed Turman, right there. That's the one that clicked in the boy's face. That's the one that shot him in the mouth. That's the one that shot him in the neck. That's the one that shot him in the back. And Mr. Darden saved one. Again, I wish he had used it on himself.
>
> * * * *
>
> He didn't go to the hospital, went on to his girl friend's He testified all this blood dripping down. I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time.
>
> * * * *
>
> Don't forget, please, about when [defense counsel] gets into five foot six and five foot eight, 185 pounds, 200 pounds, don't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the mustache and the weight. The only thing he hasn't done that I know of is cut his throat.

While these pointless remarks were by no means invited by defense counsel in the manner of those previously discussed, it is significant that defense counsel *did* have the opportunity during rebuttal to respond to them and—on balance—to turn them against the prosecution.[12] Counsel argued:

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[12] The vitriolic remarks of a prosecutor can be "prejudicial" to an accused only if they tend to evoke some sympathy or other passion or prejudice on the part of the jury in favor of the state or, perhaps, the victim of the crime, and against the defendant. It is difficult if not impossible to see how any of the offensive comments in this instance could do anything but alienate the jury and weaken the state's case. They were certainly not calculated to engender undue sympathy for the victims nor were they keyed to arouse prejudice against the accused on any basis other than the horror of the crimes themselves.

I, of course, ask you to acquit my client. That's no big surprise, but I ask you another thing, and that is, through being harangued and yelled at, and had a man storm around the courtroom and slap the paper to be demonstrative, don't let him embarrass you into a verdict. Reach the verdict on the evidence.

* * * *

Let's go back to the cross-examination of Mr. Darden for a minute. You didn't see the yelling and screaming and righteous indigation and get up and blow your face off. You didn't see that then. . . .

Why no righteous indigation at that point? If the man felt that strongly about it, how could he even get up there and examine him? But you saw him stand right over here in this courtroom, and this podium was right over here, and he just coolly and calmly went through it. . . .

Why, when you have the Defendant on the stand and the opportunity to put him through the most serious, grueling cross-examination with the intent of breaking him down, you didn't see righteous indignation. You didn't see the yelling and the screaming and the pushing and the shoving and hitting with the stick and the whole works. . . .

Well, the possibility is that he was telling the truth and the State didn't have anything to disprove it. If they had something to disprove that statement it would have been on that stand, and you did not hear it.

Before turning to a review of the applicable authorities there are two other points to be made concerning the effect of the prosecutor's argument. First, the trial judge carefully instructed the jury on two different occasions [13] that the arguments of counsel were not evidence; and, second, the improper argument proceeded without objec-

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[13] R. 185-186; 713-714.

tion until a point very near the end of the prosecutor's oration.[14]

As noted earlier, the leading authority concerning the evaluation of allegedly improper argument upon collateral review in habeas corpus proceedings is *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The Court in that decision took care to distinguish such a case from those "in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights . . ." (416 U.S. at 643, 94 S.Ct. at 1871), and also pointed out that "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice'" (416 U.S. at 642, 94 S.Ct. at 1871). More particularly, the Court specifically distinguished *Miller v. Pate* and *Brady v. Maryland*[15] because the prosecutorial misbehavior in both of those cases involved manipulation of the *evidence* as well as abuses during argument or summation; and it concluded its discussion with the following observations (416 U.S. at 645, 647-648, 94 S.Ct. at 1872, 1873):

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[14] Although the objection then made was overruled it is pertinent to note that the prosecutor avoided objectional rhetoric from that point on in his argument. Also, with respect to the Court's overruling the objection, the phrasing selected by defense counsel in stating his objection was: "I wish the Court would instruct [the prosecutor] to stick with what little evidence he has." The prosecutor responded: "You don't have any evidence yourself . . ." And the Court said: "All right, gentlemen. Proceed with your argument. Objection will be overruled." Obviously, given that exchange, if the judge had sustained the objection as stated it would be tantamount to making a direct comment on the strength or weakness of the state's case. By rebuking counsel and directing that the argument proceed the judge did about all he could do at that particular moment.

[15] *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

> Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process.
>
> * * * *
>
> The result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in *Miller* and *Brady*, *supra*, to amount to a denial of constitutional due process.

Since *Donnelly v. DeChristoforo* was decided in 1974 there have been three decisions in the Courts of Appeals in which it was determined that a writ of habeas corpus should issue in favor of a state prisoner because of improper prosecutorial argument to the jury at trial. *Miller v. North Carolina*, 583 F.2d 701 (4th Cir. 1978); *Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978); *Kelly v. Stone*, 514 F.2d 18 (9th Cir. 1975). See also, *U. S. ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973). In each of those cases, however, except *Houston*, the prosecutor made a direct appeal to racial prejudice; and such decisions are clearly distinguishable on that basis.

Houston, which also happens to be a Fifth Circuit decision, is the only Court of Appeals opinion granting habeas relief on the basis of prejudicial prosecutorial argument concerning matters other than race. The petitioner in that case had been charged in the Texas courts with the offense of possessing heroin. During summations the prosecutor first chided the defense about making objections and then repeatedly argued—even after the court had sustained objection—that the petitioner was in fact a dealer or pusher of heroin. Thus, with the defense restrained from making objections for fear of appearing to obstruct the proceedings, the prosecutor merely accelerated his attack. Moreover, in addition to the argument which effectively misstated and manipulated the

evidence, i.e., that the defendant was a dealer when the charge was simple possession, the prosecutor also committed all of the sins of the prosecution in this case as well as some not present in this record—vouching for the credibility of prosecution witnesses while branding defense witnesses as liars; characterizing defense counsel as hypocrites; making offensive remarks about the sentencing process; attempting to associate the defendant with spectators and implying threats of violence against the jury. The facts of *Houston* simply stand apart as Judge Goldberg declared in his universally eloquent style (569 F.2d at 382-383).

Two other recent decisions of the Fifth Circuit are much more similar to the facts of this case, and they point the way to a proper disposition. *Cronnon v. Alabama*, 587 F.2d 246 (5th Cir. 1979), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 792 (1979), and *Cobb v. Wainwright*, 609 F.2d 754 (5th Cir. 1980). *Cronnon* is particularly apt. In a state court murder trial the prosecutor referred to the defendant as a "fiendish ghoul;" he spoke of the assailant's desire to hear the "squish" of the victim's blood; he suggested that, unless convicted, the defendant would kill again; he called the defendant a liar and asserted that he, the prosecutor, would also lie if he was accused under similar circumstances; he exhorted the jury to place themselves in the shoes of the murdered teenager's parents; and, as in this case, the entire diatribe was delivered without objection. The Court (Judge Rubin concurring by separate opinion) denied the writ. The opinion in *Cobb* does not disclose in detail the nature of the prosecutor's challenged argument (other than apparent references to the Bible); but it is particularly instructive with respect to the view of the Circuit concerning the application of *Donnelly v. DeChristoforo*. The Court said (609 F.2d at 755-756):

> There is no question that the prosecutor in this case made an inflammatory argument. If the trial

had been in federal district court a number of his comments would have constituted more than adequate grounds for a mistrial. In a 28 U.S.C. § 2254 proceeding, however, the scope of review is a narrow one. The Supreme Court only recently ruled in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), a case also involving charges of prejudical prosecutorial comment, that not every trial error or infirmity which might on direct appeal call for application of supervisory powers correspondingly constitutes the denial of due process necessary to support a grant of relief under 28 U.S.C. § 2254. . . . Unless a specific guarantee of the Bill of Rights is involved, it must be shown that the remarks were so prejudicial that they rendered the trial in question fundamentally unfair. 416 U.S. at 643, 94 S.Ct. 1868. Here the claim is simply that the prosecutor's remarks so infected the trial with unfairness as to make the conviction a denial of due process.

Given the circumstances of this case, we conclude, and our conclusion is made easier by the strength of the evidence against Cobb, that no prejudice amounting to such a denial of constitutional due process was shown. Unlike *Houston v. Estelle*, 569 F.2d 372, 376-84 (5th Cir. 1978), a Section 2254 proceeding in which we did reverse a conviction for prosecutorial misconduct, this is not a case in which the prosecutor attempted to mislead the jury with allusions to nonexistent evidence. See also *United States v. Herberman*, 583 F.2d 222, 229-30 (5th Cir. 1978). Nor is this a case, as was *Houston*, in which the prosecutor had the last word. Here the prosecutor's argument was followed by two final defense arguments, one of which was made by Cobb's attorney on Cobb's behalf.

In this instance the Supreme Court of Florida thoroughly reviewed the issue and concluded that "although

the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility, in this particular case they amount to harmless error when the totality of the record is considered in these uniquely vicious crimes." *Darden v. State*, 329 So.2d 287, 290 (Fla.1976). The Supreme Court of the United States has recently reminded us that this determination is entitled to great deference pursuant to 28 U.S.C. § 2254(d), at least to the extent it involves a factual determination. *Sumner v. Mata*, —— U.S. ——, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). Moreover, upon an equally thorough review of the record (in search of constitutional infringement, not "reversible error"), I am also convinced that no relief is warranted. The prosecutor's argument did not involve a manipulation or misstatement of the evidence nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent; most of the objectional content was invited by or was responsive to the opening summation of the defense; the Court instructed the jury on two occasions that the argument of counsel was not evidence and that their decision was to be made on the basis of the evidence alone; the challenged argument was presented without objection;[16] the defense had the "last word" through the presentation of rebuttal argument; and the weight of the evidence against the Petitioner was heavy; indeed, the Supreme Court of Florida said there "was overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges . . ." (329 So.2d at 291). Darden's trial was not perfect—few are—but neither was it fundamentally unfair.

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[16] Lead defense counsel testified during the evidentiary hearing before the Magistrate that he deliberately withheld objection because he thought the argument might place error in the record which an objection would only serve to cure (T. 333-334). He also said (T. 365-366) that in his view the prosecutor's argument did not address the issues and "was almost an indictment of the jury." See footnote, *supra*, page 15.

III Witherspoon vs. Illinois

(a) *Is the issue presented?* The state vociferously argues that the Magistrate "fabricated" the *Witherspoon* issue which was never presented by the Petitioner or, if presented, was abandoned because it was not argued in the briefs. This contention is utterly without merit. During the course of the proceedings before the Magistrate the Respondent was granted leave to propound written interrogatories to the Petitioner. Interrogatory No. 3 requested an enumeration of all of Petitioner's claims which might present grounds for relief under 28 U.S.C. § 2254. On September 7, 1979, the Petitioner filed a supplemental answer to that interrogatory which stated, in paragraphs 19 and 20, contentions which can only be read as asserting a claim under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); and, on September 14, 1979, the parties jointly filed an amendment to their earlier pre-trial stipulation in which they incorporated all of the claims asserted in the supplemental answer to the interrogatory, and further provided that those claims should be decided on a review of the record with no additional evidence to be presented at the hearing. The Magistrate properly considered those claims. It would have been error not to do so.

(b) *The merits of the claim.* It is unnecessary to engage in any detailed analysis of *Witherspoon* or the line of Supreme Court decisions flowing after it because Judge Gee, speaking for the Fifth Circuit in *Burns v. Estelle*, 592 F.2d 1297, 1300 (5th Cir. 1979), *approved en banc*, 626 F.2d 396 (1980), fully reviewed and then summarized the development of the law:

> And so our survey of ruling Supreme Court law in the area is complete. It may be summarized:
>
> 1. Only the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all

> circumstances, is cause to exclude a juror on *Witherspoon* grounds. A mere disbelief in it, or even 'conscientious or religious scruples against its infliction' will not suffice, since many people hold such views and some of these may yet be able to overcome them and abide by the law.
>
> 2. No jury from which even one person has been excused on broader *Witherspoon*-type grounds than these may impose a death penalty or sit in a case where it may be imposed, regardless of whether an available peremptory challenge might have reached him.

In this instance, during the voir dire examination of the jury panel, a total of five prospective jurors were excused for cause due to their expressed opposition to capital punishment. The Magistrate concluded, as to two of the five, that a *Witherspoon* violation occurred. To evaluate that conclusion it will be necessary to review and quote from the trial record at some length.

It should first be observed that the trial judge was fully conscious of the existence of the *Witherspoon* decision. That is clear because the record discloses a specific pre-trial discussion of the case. Defense counsel made a motion to exclude any examination of prospective jurors concerning their attitudes about the death penalty because of the bifurcation of that issue, citing *Witherspoon*; but the trial judge ruled, quite properly, that the motion would be denied since, in the event of conviction, the same jury would then consider the issue of punishment. The Court also remarked (R. 18):

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be *unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law*, then he in effect has said he would be unwilling to follow the law the court shall

> charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause. (Emphasis supplied).

The court then called the case for trial and began the voir dire examination of the jury panel. During the course of that examination five prospective jurors were excused for cause due to the responses they gave to the judge's *Withespoon* questions. It is necessary to quote in their proper sequence seven segments of the voir dire examination during which *Witherspoon* questions were propounded and the subject jurors were excused.[17] The first segment includes the court's general explanation to the panel as a whole concerning the purpose and intent of the *Witherspoon* examination followed immediately by the specific questioning which resulted in the excusal of prospective jurors Varney and Mays. The remaining sequential quotations reveal the court's questioning of other jurors down through the examination and excusal of juror Murphy, the last to be excused for cause.

> [The court] At this time I want to get off into a different area concerning the capital punishment feature of the case. I have explained to you already the basic procedure. How we have a two section trial and how although the final determination in the event of a verdict of guilty of first degree murder the final determination as to penalty will be mine. But that you, if you are selected on the jury, would be called upon to listen to further testimony and to advise me by advisory sentence.
>
> Now at the time of the submission of the case, should that time ever arrive, you will be instructed by me on the law as to what matters you should consider and what you should not consider and how you should go about in arriving at your advisory sentence. Under certain cir-

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[17] R. 42-46; 49; 88; 106-107; 109-110; 151; 165. All emphasis supplied.

cumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating then it would be proper under the law your correct verdict would be to recommend the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be *unwilling* to vote to return an advisory sentence recommending the death sentence *even though the facts presented to you should be such as under the law would require that recommendation?* Do you understand my question? . . .

All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling *under any circumstances* to recommend the death sentence?

MRS. MACY: No, sir.

THE COURT: Do you, Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No, sir.

MR. VARNEY: Yes, sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be *unwilling* to return such a recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would.

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service.

CLERK: Debora Ratley.

(Ms. Ratley was seated in the jury box.)

CLERK: Number 114.

THE COURT: Mrs. Hann, do you hold such trong conscientious moral or religious beliefs that you would be *unwilling under any event* to return a death sentence?

MRS. HANN: No, sir.

THE COURT: Mr. Waller?

MR. WALLER: No, sir.

THE COURT: Mr. DeMilt?

MR. DeMILT: No, sir.

THE COURT: Mr. Dorminy?

MR. DORMINY: No, sir.

THE COURT: Mrs. Keck?

MRS. KECK: No, sir.

THE COURT: Mr. Roberts?

MR. ROBERTS: No, sir.

THE COURT: Mr. Mays?

MR. MAYS: Yes. I could not recommend it.

THE COURT: All right.

You will be excused, Mr. Mays. Mr. Maloney, I assume you wish the same objection to apply to him.

MR. MALONEY: Yes, Your Honor.

THE COURT: So recorded.

* * * *

THE COURT: Do either of you know of any reason why you couldn't sit as a fair and impartial jurors in this case?

MR. PURCELL: No.

MRS. O'BRY: No.

THE COURT: Do either of you hold such strong moral or religious conscientious principles in opposition to the imposition of the death penalty that you would be *unwilling* to recommend the imposition of the death penalty *regardless of the evidence?*

MR. PURCELL: No.

MRS. O'BRY: No.

THE COURT: All right, Mr. McDaniel, if you are going to conduct the examination for the State you may inquire.

* * * *

THE COURT: And will you require the State to prove his guilt beyond every reasonable doubt as I have defined reasonable doubt to you?

MR. CARHUFF: Yes, sir.

MR. SCHNEIDER: Yes, sir.

MRS. LUCKER: Yes, sir.

THE COURT: Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be *unwilling* to vote to recommend the death penalty *regardless of what the evidence was?*

MR. CARHUFF: No, sir.

MR. SCHNEIDER: No, sir.

MRS. LUCKER: No, sir.

* * * *

[The court] Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?

MS. CARN: I don't think that would; but I do not believe in capital punishment.

THE COURT: The question isn't, ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it *unable* for you to vote to return a recommendation of the death penalty *regardless of what the evidence might be.*

MS. CARN: That's right.

THE COURT: All right, ma'am. Then we will excuse you then right now. I appreciate your candor.

* * * *

[The court] I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be *unwilling* to vote to return a recommended sentence of the death penalty *regardless of what the evidence or the facts might be?*

Would you Ms. Pigeon?

MS. PIGEON: Yes, sir

THE COURT: Mr. Wall?

MR. WALL: No, sir.

THE COURT: How about you, Ms. Maher?

MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

THE COURT: *And no matter what the evidence showed* you don't think you would vote for it?

MS. MAHER: I couldn't, sir.

THE COURT: Very well, over the objections of the defendant she will be excused.

(Ms. Maher was excused from the jury box.)

* * * *

THE COURT: Do you have any religious, moral or conscientious principles against the death penalty that are so strong that you would be unwilling to vote to recommend the death penalty regardless of what the facts might be?

* * * *

CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be *unable* without violating your own principles to vote to recommend a death penalty *regardless of the facts?*

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

The Magistrate characterized the examination of juror Varney (at the beginning) and juror Murphy (at the end) as too "cursory" and "abbreviated," and concluded that, as to them, "the hard question was not asked." (Magistrate's Report and Recommendation, page 30). Apart from the relative length of the examination—which has no legal significance—I am at a loss to understand the Magistrate's conclusion that the "hard" question was not asked. Clearly, the hard question *was* asked, repeatedly and without deviation from the minimal requirements of *Witherspoon*. In each instance the jurors were interrogated as to whether they would be "unwilling" or "unable" to recommend a death sentence "regardless of the facts" or "regardless of the evidence." The jurors who were excused gave affirmative responses to those "hard" questions and they were properly dismissed.[18]

This is not a case like *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), or *Burns v. Estelle*, *supra*, in which prospective jurors were merely asked whether the specter of the death penalty might "affect" them in their deliberations; nor is it a case like *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), or *Maxwell v. Bishop*, 398 U.S. 262,

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[18] In addition to finding the questions of the court to be insufficient in form, the Magistrate also found the response of juror Varney to be ambiguous when he ultimately answered "I believe I would." It must be noted, however, that Mr. Varney first gave an unqualified yes in answer to the question whether he would be "unwilling under any circumstances to recommend the death sentence." Because of his affirmative response the Court pressed the subject with another question and he declared, again, "I believe I would." Nothing more was required. A juror should be subjected to voir dire examination, not cross examination.

90 S.Ct. 1578, 26 L.Ed.2d 221 (1970), in which some prospective jurors were asked only if they had any "fixed opinions" or "feelings," or whether they harbored any scruples about capital punishment which "might" prevent such a verdict. Rather, the voir dire examination in this case is indistinguishable from the approved examination of the regular members of the jury in *Smith v. Whisman*, 431 F.2d 1051, 1058 (5th Cir. 1970), in which jurors were asked whether their opposition to capital punishment would prevent them from returning a death verdict "under any circumstances." See also *Boulden v. Holman*, *supra*, in which the Court approved the excusal of those jurors who simply stated that they would "never" impose a death sentence.

There was no *Witherspoon* violation in this case.

IV Conclusion

The Petitioner's trial was not perfect, but neither was it fundamentally unfair. His jury was properly examined on voir dire and none was excused merely because of expressed opposition to capital punishment. His other claims of constitutional deprivation were determined by the Magistrate to be unfounded, and in that the Magistrate was correct.

The petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, and the stay of the warrant is DISSOLVED. The Clerk is directed to enter final judgment.

V Epilogue

The Turman murder occurred in 1973. Darden was quickly apprehended, and was promptly tried, convicted and sentenced within a year. His direct appeal was decided by the Supreme Court of Florida in 1976, and the following year the Supreme Court of the United States discharged a writ of certiorari previously granted. Clemency proceedings occupied the next two years, and the Governor ultimately signed a death warrant in May,

1979. Petitioner then filed the instant petition in this Court, pursuant to 28 U.S.C. § 2254, almost six years after the offense.

The nature of the case, and others like it, has attracted intensive publicity which has, in turn, served to fuel a growing public frustration concerning the administration of criminal justice in the courts. The Chief Justice of the United States in his last annual address to the American Bar Association recognized and gave voice to the same public frustration; and, to the extent that this very real exasperation is fomenting an overall loss of confidence on the part of the public in its court system, particularly the federal courts, those who supply the public with information and opinion should be particularly careful to impart only that information which is accurate in every detail. Unfortunately, many lay persons and even some lawyers and judges do not seem to understand the historical or the contemporary role of the federal courts in habeas corpus proceedings involving state prisoners, and that lack of understanding has caused the public to be the recipient of a considerable quantity of misinformation and erroneous innuendo concerning the proper institution of government upon which responsibility should be placed for both the condition and the cure.

The Constitution of the United States, Article I, Section 9, Clause 2, the so-called non-suspension clause, provides as follows:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Many seem to believe that this constitutional provision is the direct jurisdictional base of habeas corpus proceedings involving state prisoners. That conclusion is open to substantial doubt. Until 1867, or during the first seventy-eight years of constituional government, the writ of habeas corpus in the federal courts was governed by

the Judiciary Act of 1789 and extended only to prisoners held in custody by the United States, not the several states. Furthermore, even with respect to federal prisoners, the scope or power of the writ was limited to an inquiry as to the jurisdiction of the sentencing tribunal.

In 1867 the availability of the writ of habeas corpus in the federal courts was extended to state prisoners by act of congress now embodied in 28 U.S.C. § 2254. Even then, however, the early cases limited the reach of the writ to an examination of the jurisdiction of the sentencing court. See *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 250, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854 (1973) (Powell, J., concurring), and *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Recently, in *Swain v. Pressley*, 430 U.S. 372, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977), dealing with the statute creating the Superior Court of the District of Columbia, the Court's decision suggests that the District Courts might well be relieved, with constitutional impunity, of any jurisdiction to issue writs of habeas corpus at the behest of state prisoners so long as state law affords an adequate and effective collateral remedy to test the legality of the petitioner's detention.

In any event, whether the constitution has etched the writ in stone to any degree or not at all is not the point here. It is enough that the existing *statutes*, 28 U.S.C. §§ 2241 and 2254, afford the remedy and thus *require* the District Courts to entertain a state prisoner's application for a writ of habeas corpus if it is claimed that he is detained in custody in violation of the Constitution or laws or treaties of the United States. Moreover, the fact that the state courts have heard and adjudicated the constitutional claim does not generally [19] preclude the au-

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[19] *Stone v. Powell*, *supra*, dealing with Fourth Amendment issues, constitutes an exception.

thority and duty of the District Court to make an independent determination of the constitutional issue. Indeed, as a matter of comity to the state courts, the statute requires that all exising state remedies be exhausted *before* the petition is filed in the federal courts so that, of necessity, the habeas proceeding is always a re-hashing of the constitutional issues already decided in the state courts.

The point of this discussion is that, while there is great clamor for statutory redress of our present law concerning habeas corpus relief, all involved should remember (or should be clearly informed, as the case might be) that the existing law is itself of *statutory* origin. It was not created, and cannot be amended, by the courts. Given the statute it would be a gross violation of law and of a judge's oath of office if he should arbitrarily decline to entertain a proper petition filed under it; and to the extent there is widespread belief that the federal courts have somehow "bootstrapped" their own authority to indiscriminately meddle in state court criminal prosecutions—a belief nurtured by inferences to that effect in the public press—unjustified and unnecessary damage is being done to the very system of judicial administration in which all of us are so vitally interested. Those who wish to debate the need for change should focus their attention and the brunt of their remarks upon the statute and the Congress, not the Courts.

In addition to substantive issues, there is also public concern about the length of time taken by the courts in disposing of habeas corpus proceedings. Quite apart from the notoriously crowded dockets of the federal courts, however, a circumstance which is also beyond the control of the courts, there is no provision in 28 U.S.C. § 2254 requiring expedited consideration whereas there are at least two dozen other statutes which do require that preference be given to specified classes of cases such as,

for example, criminal cases governed by the Speedy Trial Act, 18 U.S.C. § 3161.[20]

Whatever the future may hold for habeas corpus proceedings instituted by state prisoners generally, and whatever the public perspective may be, the case of Willie Jasper Darden has been thoroughly, thoughtfully and quietly considered under the statute and the Constitution, and judgment will now be entered as directed. The Petitioner may then seek timely review by the Court of Appeals, as is his right.

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[20] A habeas corpus proceeding under 28 U.S.C. § 2254 is a civil case in the federal court. Examples of other statutes requiring expedited consideration of certain civil cases are 42 U.S.C. § 2000e-5(f)(5), Equal Employment Opportunity Act; 42 U.S.C. § 1971(g), Voting Rights Act; 29 U.S.C. § 1303(e)(4), Employee Retirement Income Security Act; 42 U.S.C. § 504(e), Social Security Act.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,
PETITIONER, CROSS-RESPONDENT

v.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections, State of Florida,
RESPONDENT, CROSS-PETITIONER

Feb. 14, 1983

As Corrected March 9, 1983

Appeals from the United States District Court
for the Middle District of Florida

OPINION ON GRANTING OF REHEARING EN BANC APRIL 6, 1983

Before FAY and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.

FAY, Circuit Judge:

Willie Jasper Darden appeals the district court's denial of his habeas corpus petition challenging his conviction for first degree murder and sentence of death and raises three issues; whether the closing arguments of the state prosecuting attorneys denied him a fair trial; whether he received ineffective assistance of counsel; and whether the jury selection process violated the mandates of

Witherspoon v. Illinois. After careful consideration of the issues raised on appeal, we affirm the denial of petition for the writ of habeas corpus.

Background

Based upon a series of events occurring at Carl's Furniture Store in Lakeland, Florida on September 8, 1973,[1] appellant Darden was charged with the first degree murder of Carl Turman, the robbery of Helen Turman and the assault with intent to commit murder of Philip Arnold. The trial jury found Darden guilty on all three counts. Pursuant to the bifurcated trial procedure mandated by Fla.Stat. § 921.141 (1973), the jury recommended that Darden be sentenced to death. The trial judge subsequently entered findings and imposed the death sentence.

Darden appealed to the Supreme Court of Florida which affirmed the convictions and sentence. *Darden v. State*, 329 So.2d 287 (Fla.1976). The United States Supreme Court granted a petition for writ of certiorari, *Darden v. Florida*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed. 2d 282 (1976), and limited the issue to be considered to whether the prosecution's summation to the jury deprived Darden of due process of law. *Darden v. Florida*, 429 U.S. 1036, 97 S.Ct. 729, 50 L.Ed.2d 747 (1976). However, the Court subsequently dismissed the writ of certiorari as improvidently granted. *Darden v. Florida*, 430 U.S. 704, 98 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

After the Governor signed a warrant for Darden's execution, Darden filed a petition for writ of habeas corpus in the district court. A stay of execution was entered and the case assigned to a magistrate. The magistrate held an evidentiary hearing on October 22 and 23, 1979 on Darden's claim of ineffective assistance of counsel. The

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[1] The historical facts are set out in more detail in *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla. 1981) and *Darden v. State*, 329 So.2d 287 (Fla. 1976).

magistrate filed his report and recommended that Darden's petition for writ of habeas corpus be granted on his claims of prosecutorial misconduct during the summation and of improper excusal of prospective jurors. The magistrate found that Darden's other twenty-four claims, including that of ineffective assistance of counsel, were without constitutional merit. Both Darden and the State filed objections to the magistrate's report and recommendation.

After a hearing, the district court entered its thorough and well considered Memorandum Opinion rejecting the magistrate's recommendations and denying Darden's petition for writ of habeas corpus. Darden timely appealed the order of the District court raising three issues for our consideration.

Prosecutorial Misconduct During Summation

Darden contends that remarks made by the Florida assistant state attorneys [2] during closing arguments during the guilt phase were so prejudicial as to constitute a denial of his right to due process. On cross-appeal, the state argues that the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars our consideration of the merits of Darden's claim of prosecutorial misconduct. The state's position is without merit for two reasons. First, Darden's counsel did object twice during the prosecutor's final argument.[3] Second, on direct appeal of Darden's conviction

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[2] The state divided its closing argument between attorneys C. Ray McDaniel and Norman White. Most of the improper comments were uttered in the latter and more lengthy portion of the argument by Mr. McDaniel. Neither prosecutor's conduct was an ethical model worth emulation.

[3] Mr. McDaniel: [T]his sponsor, otherwise his girlfriend, knew that he was a criminal—prisoner, I'm sorry, prisoner; knew, let him bring the gun into her house while he was on weekend furloughs.

[Continued]

and sentence the Florida Supreme Court considered the issue. It is well settled that where a state appellate court has adjudicated an issue on its merits, federal courts may consider it in a petition for habeas corpus. *Sasson v. Stynchombe*, 654 F.2d 371, 374 (5th Cir. 1981); *Thompson v. Estelle*, 642 F.2d 996, 998 (5th Cir. 1981); *Moran v. Estelle*, 607 F.2d 1140, 1142 (5th Cir. 1979); *Cannon v. State of Alabama*, 558 F.2d 1211, 1216 n. 12 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). The state's suggestion that the Florida Supreme Court did not dispose of the issue on its merits is untenable.[4] *Wainwright v. Sykes* is therefore

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[3] [Continued]

> Mr. Goodwill: Now, I object. There's been no testimony of this.

Record at 751.

> Mr. McDaniel: [D]on't forget, please about when Mr. Goodwill gets into five foot six and five foot eight, 185 pounds, 200 pounds, don't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.
>
> Mr. Maloney: Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. I wish the Court would instruct Mr. McDaniel to stick with what little evidence he has.
>
> Mr. McDaniel: You don't have any evidence yourself, Mr. Maloney.
>
> The Court: All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir.

Record at 779-780.

While the state points out the testimony of Mr. Goodwill during the evidentiary hearing in federal court on the ineffective assistance of counsel issue indicates that defense counsel's failure to object more or earlier may have been a tactical decision, this does not contradict the fact that counsel did object, however inartfully.

[4] The Supreme Court of Florida engaged in a lengthy several page analysis of the prosecutor's conduct which concluded, "Our

not a bar to our consideration of Darden's claim that prosecutorial misconduct denied him due process.

On a habeas corpus petition, our standard of review of the prosecutor's comments at trial is "the narrow one of due process, and not the broad exercise of supervisory power that [federal appellate courts] possess in regard to [their] own trial court[s]." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1973). "In order for a state habeas corpus petitioner to prevail on a claim that an improper jury argument marred his trial, the asserted error must be one of constitutional magnitude. This means that the prosecutorial remarks must be so prejudicial that they render the trial fundamentally unfair." *Houston v. Estelle*, 569 F.2d 372, n. 8 (5th Cir. 1978).

There is no dispute in this case that "the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility." *Darden v. State*, 329 So.2d at 290. The district court noted that "anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility, Canon 7, EC 7-24 and DR 7-106(C)(4), could not possibly improve" upon the example provided by the prosecutor during Darden's trial.[5] *Darden v. Wainwright*, 513

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review of the record convinces us that the remarks complained of were not sufficient to deprive Appellant of a fair trial when the totality of evidence is considered." *Darden v. State*, 329 So.2d at 291. The state Supreme Court thereafter noted in a single short paragraph that it had previously held that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made. *Id.* We therefore agree with the district court that the Supreme Court of Florida "clearly entertained and determined the fair trial issue on its merits as the primary basis of its decision." 513 F.Supp. at 952. *Ratcliff v. Estelle*, 597 F.2d 474 (5th Cir. 1979) does not compel a different result.

[5] The district court had specific reference to the prosecutor's expression of his personal opinion regarding Darden's guilt:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he

F. Supp. at 955. However, our inquiry must be whether the prosecutor's remarks denied Darden a fundamentally fair trial. Further, it is "well established that in reviewing prosecutorial comments for possible prejudice, a court must not consider the comments in isolation. The comments must be evaluated in the context not only of the prosecutor's entire closing argument but of the trial as a whole." *Cobb v. Wainwright*, 609 F.2d 754, 755 n. 7 (5th Cir. 1980).

Because of a state procedural rule,[6] Darden's trial counsel had the opportunity to present the initial summation as well as rebuttal to the prosecutor's closing arguments. Thus, the prosecutor's comments must be considered in light of the defense attorney's initial summation which concentrated on the lack of evidence in the case, placing blame for this lack on the Polk County Sheriff's Office.[7] The defense argument also alluded to the death penalty,[8]

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murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

513 F.Supp. at 955.

[6] Florida Rules of Criminal Procedure, Rule 3.250 (1973) provided that "a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury."

[7] The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it. We all know there has been no expert testimony.

Record at 728.

[8] You people would just be putting in time and so would I. But I'm not putting in time. I haven't been putting in time for the last five years, because they don't have it. They didn't bother to do it. They took a coincidence and they magnified that into a capital case. And they are asking you to kill a man on coincidence.

Record at 730. *See also* note 10 *infra*.

introduced the idea of an "animal" as the perpetrator of the crimes [9] and contained personal opinion.[10]

The prosecutors then delivered closing remarks which, as the district court noted, even the state has candidly asserted no one has ever even weakly suggested were anything but improper. 513 F. Supp. at 952. The prosecutors attempted to place blame for the crime on the state's Division of Corrections since Darden was on furlough at the time of the offense, often implying that the death penalty would be the only insurance against a future similar act.[11] Like the defense, one prosecutor's argument

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[9] I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal.

Record at 717.

And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. Fires away, again hits him in the back, and he keeps on running. Mrs. Hill said he ran 500 yards before he collapsed in front of her house. It's the work of an animal, there's no doubt about it.

Record at 731-2.

[10] So they come on up here and ask Citrus County people to kill the man. You will be instructed on lesser included offenses. I think that you will find it rather boring. The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do. Thank you for your time.

Record at 736-7.

[11] But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public.

used the word "animal" [12] and contained personal opin-

Can we expect him to stay in a prison when they go there? Can we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

Record at 749-750.

No, I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy.

Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose . . .

Record at 750-1.

He is a prisoner. He is supposed to be. Mr. Turman is dead because of that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it.

Record at 752.

I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—

Record at 753.

There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections.

Record at 764-5.

I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you.

Record at 782.

[12] As far as I am concerned, and as Mr. Maloney said as he identified this man as an animal, this animal was on the public for one reason.

Record at 749.

But I am sure that I want you to remember Mr. Maloney's opening statement, opening argument when he called this per-

ions.[13] The other prosecutor resorted to some statements which can only be described as tasteless and unprofessional.[14] Darden's attorneys then had the opportunity to rebut the prosecutors' statements on the final closing argument.[15]

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son an animal. Remember that, because I will guarantee you I will ask for death. There is no question about it.

Record at 753.

[13] See *e.g.*, note 5 *supra*.

[14] He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.

Record at 750.

I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish I could see him sitting here with no face, blown away by a shotgun.

Record at 758.

I wish someone had walked in the back door and blown his head off at that point.

But he is lucky, the public unlucky, people are unlucky, it didn't happen.

Record at 759.

[h]e fired in the boy's back, number five saving one. Didn't get a chance to use it. I wish he had used it on himself.

Record at 774.

And Mr. Darden saved one. Again, I wish he had used it on himself.

Record at 795.

I wish he [Darden] had been killed in the accident, but he wasn't. Again, we are unlucky that time.

Record at 775.

[d]on't forget what he [Darden] has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.

Record at 779.

[15] *Cf. Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978), where the Court noted that the defense could no longer respond to the prose-

While the prosecutors' comments would have been reversible error in an appeal from a federal criminal case,[16] this case is before us on a petition by a state prisoner for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Our inquiry is therefore limited to whether the prosecutorial comments were so prejudicial as to render the trial fundamentally unfair as a matter of constitutional law. *Houston v. Estelle*, 569 F.2d at 378. The United States Supreme Court has noted that "the process of constitutional line drawing in this regard is necessarily imprecise." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). It is not enough that the prosecutors' remarks were undesirable or even universally condemned. *Cobb v. Wainwright*, 609 F.2d at 754. A defect of constitutional proportions is not to be found in any but egregious cases. *Houston v. Estelle*, 569 F.2d at 382.

The district court concluded that habeas corpus relief was not warranted on the basis of the prosecutorial summation reasoning:

> The prosecutor's argument did not involve a manipulation or misstatement of the evidence nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent; most of the objectional content was invited by or was responsive to the opening summation of the defense; the Court instructed the jury on two occasions that the argument of counsel was not evidence and that their decision was to be made on the basis of the evidence alone; the challenged argument was presented without objection; the defense had the "last word" through the presentation of rebuttal argument; and

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cutorial argument except by objection and the prosecutor had prejudiced the right of defendant to object to impermissible comments by implying that defense counsel were trying to take the case away from the jury. *Id.* at 377.

[16] *See e.g., United States v. Corona*, 551 F.2d 1386 (5th Cir. 1977).

> the weight of the evidence against the Petitioner was heavy; indeed, the Supreme Court of Florida said there "was overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges . . ." Darden's trial was not perfect—few are—but neither was it fundamentally unfair.

513 F. Supp. at 958. [citation and footnote omitted]. Having considered the prosecutors' remarks and evaluated them in light of Darden's entire trial, we agree with the district court's conclusion that the prosecutors' comments did not deny Darden a fundamentally fair trial.

Ineffective Assistance of Counsel

On appeal, Darden contends he was denied his sixth amendment right to the effective assistance of counsel during the guilt and penalty phases of his trial. After an evidentiary hearing, the magistrate issued a report and recommendation rejecting Darden's ineffective assistance of counsel claim. The district court likewise found no merit in Darden's claim.

It is well settled that the standard to be applied in evaluating ineffective assistance of counsel claims is whether counsel was "reasonably likely to render and did render reasonably effective assistance of counsel." *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *adhered to en banc*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). Whether counsel has rendered adequate assistance is a mixed question of law and fact that requires the application of legal principles to the historic facts of the case. *Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-1715, 64 L.Ed.2d 333 (1980); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982). The assistance rendered must be evaluated from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to counsel at that time.

Proffitt v. Wainwright, 685 F.2d 1227 at 1247 (11th Cir. 1982).

We have carefully examined the record in this case and find that the performance of Darden's defense attorneys, during either the guilt or penalty phase of the trial, did not fall below the "reasonably effective assistance" standard.

Jury Selection

Darden contends that the jury which convicted him and recommended the death penalty failed to include a true cross section of the community because two prospective jurors were improperly excused for cause because of their scruples against the death penalty in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The magistrate recommended that the petition for habeas corpus be granted on the basis of the excusal of venirepersons Varney and Murphy. The district court disagreed and held that "[i]n each instance, the jurors were interrogated as to whether they would be 'unwilling' or 'unable' to recommend a death sentence 'regardless of the facts' or 'regardless of the evidence.' The jurors who were excused gave affirmative responses to those 'hard' questions and they were properly dismissed." 513 F. Supp. at 962.

Witherspoon has been interpreted and applied in a plethora of cases. It is well settled that a state has the power to

> execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), *quoting Witherspoon v. Illinois*, 391 U.S. at 522-23, n. 21, 88 S.Ct. at 1777 (emphasis in original).

Neither *Witherspoon* nor *Adams* provides trial courts with a formula or requisite colloquy for the proper excusal of prospective jurors on *Witherspoon* grounds. Instead, the trial judge must decide whether each particular venireperson has made it "unmistakably clear" that he or she is within one of the two prongs of *Witherspoon*. The trial judge is in the best position to evaluate the prospective juror's demeanor and answers to the question. For this reason, trial judges are generally accorded broad discretion in evaluating juror impartiality. *See, Irwin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639; 6 L.Ed.2d 751 (1961); *United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1977). This tenent has even greater efficacy in a situation such as the present one—a federal appellate court reviewing the decision of a federal district court on a § 2254 habeas corpus petition alleging constitutional error in a state trial. The state court's factual findings are entitled to a presumption of correctness. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). Nevertheless, close scrutiny of the voir dire examinations of the prospective jurors is necessary to insure strict adherence to the mandates of *Witherspoon*. *See, Granviel v. Estelle*, 655 F.2d 673, 677 (5th Cir. 1981); *B—— v. Estelle*, 626 F.2d 396 (5th Cir. 1980) (en banc). Such scrutiny of the cold record must not, however, treat the words of prospective jurors as free floating icebergs unrelated to the voir dire examination as a whole. The statements of veniremen Varney and Murphy, like all statements, must be examined and interpreted in the context in which they occurred.

As noted by the district court,[17] the state trial judge was cognizant of *Witherspoon*. During voir dire, the trial

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[17] It should first be observed that the trial judge was fully conscious of the existence of the *Witherspoon* decision. That is

court explained the "capital punishment feature of the case" (R. at 42) and the following colloquy occurred:

> THE COURT: Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?
>
> MR. MALONEY: Your Honor, pursuant to the motion I filed beforehand I object to this question. I believe that it is irrelevant to the matter at hand and I think that the discussion of this at this time prejudices the defendant's right to a fair and impartial trial.
>
> THE COURT: All right, sir. Motion will be denied and the objection overruled.

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clear because the record discloses a specific pretrial discussion of the case. Defense counsel made a motion to exclude any examination of prospective jurors concerning their attitudes about the death penalty because of the bifurcation of that issue, citing *Witherspoon*; but the trial judge ruled, quite properly, that the motion would be denied since, in the event of conviction, the same jury would then consider the issue of punishment. The Court also remarked (R. 18):

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be *unwilling to recommend a death penalty even though the facts and circumstances meet the requirements of law*, then he in effect has said he would be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause. (Emphasis supplied).

513 F.Supp. at 959.

All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?

MRS. MACY: No, sir.

THE COURT: Do you, Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike?

MRS SPIKE: No, sir.

MR. VARNEY: Yes, sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would.

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service.

The trial court and counsel then proceeded with the examination of other prospective jurors, the transcription of which comprises over one hundred pages of the record. During this interim, three other venirepersons were ex-

cused for cause on *Witherspoon* grounds.[18] The last prospective juror to be so excused was Murphy:

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[18] Venirepersons Mays, Carn and Maher were excused.

THE COURT: Mrs. Hann, do you hold such strong conscientious moral or religious beliefs that you would be unwilling under any event to return a death sentence?

Mrs. Hann: No, sir.

The Court: Mr. Waller?

Mr. Waller: No, sir.

The Court: Mr. DeMilt?

Mr. DeMilt: No, sir.

The Court: Mr. Dorminy?

Mr. Dorminy: No, sir.

The Court: Mrs. Keck?

Mrs. Keck: No, sir.

The Court: Mr. Roberts?

Mr. Roberts: No, sir.

The Court: Mr. Mays?

Mr. Mays: Yes. I could not recommend it.

The Court: All right.

You will be excused, Mr. Mays. Mr. Maloney, I assume you wish the same objection to apply to him.

Mr. Maloney: Yes, Your Honor.

The Court: So recorded.

(Mr. Mays was excused from the jury box.)

R. at 45-46.

The Court: Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officer and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?

Ms. Carn: I don't think that would; but I do not believe in capital punishment.

The Court: The question isn't, ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you

[Continued]

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

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[18] [Continued]

to vote to return a recommendation of the death penalty regardless of what the evidence might be.

Ms. Carn: That's right.

The Court: All right, ma'am. Then we will excuse you then right now. I appreciate your candor.

Mr. Maloney: Your Honor, once again I object. I don't think that is relevant.

The Court: Objection will be noted.

(Ms. Carn was excused from the jury box.)

R. at 106-107.

The Court: I have asked the others and I will ask each of the four of you whether you have such strong religious conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be? Would you Ms. Pigeon?

Ms. Pigeon: Yes, sir.

The Court: Mr. Wall?

Mr. Wall: No, sir.

The Court: How about you, Ms. Maher?

Ms. Maher: Yes, I do have such convictions. I am a Seventh Day Adventist.

The Court: And no matter what the evidence showed you don't think you would vote for it?

Ms. Maher: I couldn't, sir.

The Court: Very well, over the objections of the defendant she will be excused.

(Ms. Maher was excused from the jury box.)

R. at 109-110.

> THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?
>
> MR. MURPHY: Yes, I have.
>
> THE COURT: All right, sir, you will be excused then.
>
> (Mr. Murphy left the jury box.)

R. at 165.

The state trial court did not violate the mandates of *Witherspoon* in excusing prospective jurors. All the excused venirepersons unequivocably answered that they would be "unwilling under any circumstances" or "unable without violating" their principles to recommend the death penalty.[19] In the context of the specific facts of this case, and the trial court's repeated indulgence in the *Witherspoon* inquiry, the statements of the venirepersons rendered their excusal proper under *Witherspoon*.

Conclusion

Having found that the closing arguments of the state prosecuting attorneys did not deny Darden a fair trial;[20]

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[19] We agree with the district court that venireman Varney's subsequent subjunctive statement "I believe I would" was not equivocation in the context of this case:

> It must be noted, however, that Mr. Varney first gave an unqualified yes in answer to the question whether he would be 'unwilling under any circumstances to recommend the death sentence.' Because of his affirmative response the Court pressed the subject with another question and he declared, again, 'I believe I would.' Nothing more was required. A juror should be subjected to voir dire examination, not cross examination.

513 F.Supp. at 962 n. 18.

[20] We do not understand the comment in Judge Clark's dissent relating to the Florida Public Defender's failure to object as not

that Darden received effective assistance of counsel; and that the jury selection process did not violate the mandates of *Witherspoon*, the district court's denial of the petition for writ of habeas corpus is

AFFIRMED.

CLARK, Circuit Judge, dissenting:

I cannot agree with the district court's conclusion that Darden's trial was fundamentally fair as a matter of constitutional law. I start by assuming that fair means "characterized by honesty and justice; free from fraud, injustice, prejudice or favoritism; typical, representative". *Webster's Third New International Dictionary*, 1976. I further assume that "fundamental" refers to the basic elements of a trial, such as an impartial judge and jury and right to counsel, to which every criminal defendant is entitled regardless of the evidence in a case. Stated another way, a trial lacks fundamental fairness when error is committed which is not harmless beyond a reasonable doubt. Every defendant is entitled to a fundamentally fair trial, without reference to the weight of the evidence or the heinous nature of the crime. When a defendant receives the death penalty, uncorrectable after execution, the force of the rule becomes more apparent. When the defendant's defenses are alibi and misidentification, the uncorrectability of a mistake has such a consequence that the harmless doctrine must be closely scrutinized when it is clear that the error could have affected the sentence.

From the time Darden was arrested, throughout his trial and sentencing, he maintained his innocence. The

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being a tactical decision. The record discloses that Darden's counsel did object, which we recognize. Footnote 3, *supra*. Further, the Florida Supreme Court did consider the prosecutor's closing arguments, and the merits of all issues raised in connection therewith. The Florida Supreme Court did not rely upon any lack of contemporaneous objection nor any other rule of procedural default.

evidence which convicted Darden was the identification of him by Mrs. Turman, widow of the man murdered, and Philip Arnold, who was shot by the killer. Four days after the crime and one day after the funeral, Mrs. Turman, while in a distraught state, went to the courthouse for the preliminary hearing where she identified the defendant as her husband's killer. Darden was in a very small courtroom adjoining the holding cell; he was the only black person at the defense table; and there is an indication that he was the only black person in the room. The prosecutor pointed to him and asked Mrs. Turman if this was the man who did it, to which she responded yes. All of this was over strenuous objection of Darden's counsel.[1]

The other eye witness identification was made by Philip Arnold, who was shot at the time Mr. Turman was killed. The crime occurred September 8, 1973. Arnold testified on January 18, 1974. He had seen Darden in the courtroom during the previous two days. Arnold had been shown a photograph of Darden a few days after the crime as part of a group photographic identification procedure, evidence of which was suppressed by the state trial court. It is impossible to say whether the identification was tainted by the photograph or by Arnold seeing Darden in the courtroom, but Arnold did identify Darden as the person who was in the store with Mrs. Turman immediately after her husband was shot.[2]

From the voir dire examination through closing argument, the jury was impressed with the seriousness of the identification issue. They accepted the validity of the identification and convicted Darden of first-degree murder. The recommendation of the death sentence by the jury was not unanimous. We do not know what the jury

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[1] Transcript at 215-23, Habeas Corpus proceeding at 150, *et seq.*

[2] For a review of cases discussing various methods of identification and the possibility of suggestibility inherent in some methods, see *United States v. Wade*, 388 U.S. 218, 233, 87 S.Ct. 1926, 1935, 18 L.Ed.2d 1149, 1160 (1967).

count was between 7 to 5 and 11 to 1. Because I believe the prejudicial argument of counsel had an impact upon the jury which was not harmless beyond a reasonable doubt and did affect their deliberations with respect to the death penalty, I dissent.

A short review of the prosecutorial misconduct is necessary. As stated by the district court: "At all stages of this proceeding, the state has candidly asserted that 'no one has ever even weakly suggested that [the prosecutor's] closing remarks were anything but improper . . . .'" *Darden v. Wainwright*, 513 F. Supp. 947, 952 (M.D.Fla. 1981). The majority opinion has this to say about the prosecutorial misconduct:

> There is no dispute in this case that "the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility." *Darden v. State*, 329 So.2d at 290. The district court noted that "anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility, Canon 7, EC 7-24 and DR 7-106(c)(4), could not possibly improve" upon the example provided by the prosecutor during Darden's trial.

At 1034 (footnote omitted). Numerous examples of the improper argument are set out in the opinions of the Florida Supreme Court, the district court, and the majority opinion.

Because this is a death case and there is one grossly prejudicial argument affecting the sentencing, I cannot escape the conclusion that this argument had a fundamentally unfair impact upon the result. After making his improper argument that he would believe until his death that the defendant was guilty, and that the corrections officer who released Darden on furlough from the corrections institute should also be on trial for murder, the prosecutor further stated:

> The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it . . . .

Darden v. State, 329 So.2d 287, 289 (Fla. 1976). The sole purpose of this part of the prosecutor's argument was to convince the jury that prison officials release dangerous offenders and the public could only be safe if they recommended Darden's execution. Defendant was denied a fair trial.

One of the hardest tasks facing an appellate judge is reviewing a claim of constitutional error in a state habeas corpus proceeding. The problem is more acute when there are instances where the error may be harmless beyond a reasonable doubt and others where it may not be. Comments helpful to an appellate judge in considering the subject of harmless error on appellate review are found in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), as follows:

> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.
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> • • • •
>
> In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or

> reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by their own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

328 U.S. at 762, 764-65, 66 S.Ct. at 1246, 1247-48, 90 L.Ed. at 1565-1566 (citations omitted).

With respect to harmless constitutional errors, the fundamental rule is found in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), where the court said the following which is applicable to this case:

> In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.
>
> . . . We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.*, at 86-87, 84 S.Ct. at 230. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that

> their infraction can never be treated as harmless error, this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting *highly prejudicial* evidence or *comments*, casts on someone other than the person prejudiced by it a burden to show that it was harmless. (footnote omitted)

386 U.S. at 22-24, 87 S.Ct. at 827-28, 17 L.Ed.2d at 710 (emphasis added).

Under the *Chapman* and *Fahy* standard, "there is a reasonable possibility that the [comments] complained of might have contributed to the [conviction or sentence]." Darden's right to be tried by an impartial jury was substantially affected by the inflammatory and prejudicial argument. The state offered no showing that the error was harmless.

My concern is highlighted by a view expressed in the Florida Supreme Court opinion, affirming the conviction and death penalty, where the majority opinion has this comment:

> The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair.

Darden v. State, 329 So.2d 287, 290. Darden was on trial for his life and his defenses were alibi and identification. If another person committed the crime, the heinous nature of the crime should have no affect upon the result. Darden was on a three-day furlough from the correctional

institution from which he anticipated an early parole. The prosecutor's argument that the state had committed a crime in letting Darden out on a furlough and that the only way to correct that problem was to execute Darden certainly had an impact upon this jury.

It is also my opinion that Darden had ineffective assistance of counsel by reason of his attorney not objecting to the prejudicial argument. This ineffectiveness is a part of the denial of Darden's Fourteenth Amendment right to due process. His attorney, an assistant Florida Public Defender, explained at the habeas corpus proceeding that he purposely did not object to the argument so that he could preserve an error for appeal. This was clearly against his client's best interests and not a reasoned tactical decision in light of Florida's contemporaneous objection rule which was reaffirmed in its modern-day version in 1967 by the Supreme Court of Florida in *Florida v. Jones*, 204 So.2d 515 (Fla. 1967). At page 519, the court commented that since the *Gideon* case and the appointment of counsel to defend indigents, "their rights are now well guarded by defending counsel." The court went on to say that subsequently the court would not consider an assignment of error on improper argument of the prosecutor unless an objection and motion for mistrial were timely made.

In this case the prosecutor conducted a highly inflammatory and prejudicial argument against the defendant, his ineffective counsel failed to object, and the trial court permitted this inappropriate conduct of the two lawyers to go unabated. Yet, the State in arguing the contemporaneous objection rule, relies upon the Florida Supreme Court continuing to hold that "their [indigent defendants] rights are now well guarded by defending counsel." [3] Darden's due process rights were not well guarded in this case. The state through erroneous actions of its prosecutor, state employed public defender, and state trial

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[3] *Jones* was reaffirmed in *Clark v. State*, 363 So.2d 331 (Fla. 1978).

court, combined to deny defendant his due process right to a fundamentally fair trial pursuant to the Fourteenth Amendment. These actions cannot be said to be harmless in light of the facts in this case, the bases of the defense, and the sentence of death.

In addition to dissenting on the issues of prejudicial argument of counsel and ineffectiveness of defense counsel, I dissent on the *Witherspoon* issue on the ground that the jurors were not given the opportunity to "make unmistakably clear" their inability to be impartial notwithstanding their views with respect to the death penalty.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

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* Judge Hatchett is disqualified and did not participate in this decision.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,
PETITIONER, CROSS RESPONDENT

v.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections, State of Florida,
RESPONDENT, CROSS PETITIONER

July 1, 1983

Opinion Vacated Sept. 1, 1983
See 715 F.2d 502

Appeals from the United States District Court
for the Middle District of Florida

**ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC**

(Opinion February 14, 1983, 11 Cir.,
1983, 699 F.2d 1031)

Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

PER CURIAM:

Because the court is equally divided as to whether to affirm or reverse, the judgment of the district court, 513 F. Supp. 947, is AFFIRMED by operation of law.

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,
PETITIONER, CROSS-RESPONDENT

v.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections, State of Florida,
RESPONDENT, CROSS-PETITIONER

Sept. 1, 1983

Robert Augustus Harper, Jr., Gainesville, Fla., John Perry, Tallahassee, Fla., for petitioner, cross-respondent.
Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent, cross-petitioner.

Appeals from the United States District Court
for the Middle District of Florida

EN BANC OPINION

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HEN-

DERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

BY THE COURT:

On its own motion, the court en banc orders that the decision entered by it on July 1, 1983, 708 F.2d 646, affirming the decision of the district court by reason of an evenly divided court, is VACATED, and the court en banc will reconsider the case without oral argument during the week of September 12, 1983.

The execution of appellant Willie Jasper Darden is STAYED pending such reconsideration and further order by the court.

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,
PETITIONER-APPELLANT, CROSS-RESPONDENT

v.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections, State of Florida,
RESPONDENT-APPELLEE, CROSS-PETITIONER

Feb. 22, 1984

Certiorari Denied June 4, 1984
See 104 S.Ct. 2688

Appeals from the United States District Court
for the Middle District of Florida

EN BANC OPINION

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

JOHNSON, Circuit Judge:

Willie Jasper Darden appeals the denial by the district court of his habeas corpus petition, challenging the constitutionality of his conviction and death sentence. As grounds for relief, petitioner claims that he was denied effective assistance of counsel, that the prosecutors' closing arguments to the jury denied him a fair trial, and that venirepersons were improperly excluded from the jury in violation of the rule of *Witherspoon v. Illinois*. This Court sitting en banc has twice considered issues raised by this appeal and has concluded on the basis of the Supreme Court's uniform and consistent application of the rule in *Witherspoon* that the district court's denial of habeas relief must be reversed.

Darden was charged with first degree murder, robbery and assault with intent to commit murder in the first degree based upon events occurring at Carl's Furniture Store in Lakeland, Florida, on September 8, 1973.[1] The jury found Darden guilty on all three counts and recommended the penalty of death. The trial court concurred in the jury's recommendation and imposed the death sentence.

Darden's conviction and sentence were affirmed by the Florida Supreme Court in *Darden v. State*, 329 So.2d 287 (1976). The United States Supreme Court initially granted Darden's petition for writ of certiorari, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282, but later dismissed the writ as improvidently granted, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751.

After the Governor of Florida signed a warrant for Darden's execution, Darden filed a petition for habeas relief in the United States District Court for the Middle District of Florida, raising the issues presented in this appeal. The court entered a stay of execution and as-

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[1] The historical facts are set out in greater detail in *Darden v. Wainwright*, 513 F.Supp. 947 (M.D. Fla. 1981), and *Darden v. State*, 329 So.2d 287 (Fla. 1976).

signed the case to a magistrate who, after a hearing on the ineffective assistance of counsel claim, recommended that the district court grant the habeas petition on the basis of Darden's claims of prosecutorial misconduct during closing argument and improper juror excusal. The district court rejected the magistrate's recommendation and denied habeas relief. Darden timely noticed this appeal.

I. THE *WITHERSPOON* ISSUE

The Legal Standard. During the jury qualification and selection procedure, the trial court excused for cause several venirepersons who expressed opposition to the death penalty. Petitioner argues that two of these dismissals were errors of constitutional magnitude under the standard established by the Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

In *Witherspoon*, the Supreme Court held that a death sentence "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522, 88 S.Ct. at 1777 (footnote omitted). *Witherspoon* recognized that a jury purged of all those who express religious or conscientious scruples against capital punishment is not the impartial jury promised by the Sixth and Fourteenth Amendments; it is instead "a jury uncommonly willing to condemn a man to die." *Id.* at 521, 88 S.Ct. at 1776. The Court at the same time recognized the necessity of excusing jurors whose intractable opposition to capital punishment would distort their judgment on the facts developed in the case before them and would frustrate the state's legitimate efforts to implement an otherwise constitutional death penalty scheme. The Court thus fashioned the rule that prospective jurors cannot be excused

from jury service on the basis of their opposition to the death penalty unless they make it

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. at 522 n. 21, 88 S.Ct. at 1777 n. 21 (emphasis in original).

This Circuit strictly adheres to the mandate of *Witherspoon*, *Granviel v. Estelle*, 655 F.2d 673, 677 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982),[2] which we understand to require that

> [o]nly the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on *Witherspoon* grounds.

Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir.1979), *adhered to en banc*, 626 F.2d 396 (1980).

Witherspoon sets a strict legal standard and imposes as well a very high standard of proof. The venireperson must make it "unmistakably clear" that he or she will automatically vote against the death penalty. 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21. "Unless a venireman states unambiguously that he would automatically vote against imposition of capital punishment no matter what the trial might reveal, it simply cannot be as-

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[2] The Eleventh Circuit Court of Appeals has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent, which is binding unless and until overruled or modified by this Court en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

sumed that that is his position." *Id.* at 515-16 n. 9, 88 S.Ct. at 1773-74 n. 9. Thus, any ambiguity must be resolved by not excluding the venireperson from the jury.

The Standard of Appellate Review. Application of the *Witherspoon* rule and its standard of proof has generated a plethora of cases in which appellate courts have closely reviewed trial courts' voir dire examinations of prospective jurors to determine whether those excluded made unmistakably clear their rigid resolve to oppose the death penalty. In these many cases, no court has explicitly determined the standard that should govern appellate review of trial courts' *Witherspoon* decisions. Courts instead have proceeded without discussion to review independently the transcript of the voir dire questioning and to determine whether the constitutional standards articulated in *Witherspoon* were met. The question of the appropriate standard of review recently has come to the fore with some suggestion that *Witherspoon* review should accord considerable deference to the decision reached by the trial judge. *See O'Bryan v. Estelle*, 714 F.2d 365, 391-96 (5th Cir.1983) (Higginbotham, J., concurring); *id.* at 400-12 (Buchmeyer, J., dissenting); *Alderman v. Austin*, 695 F.2d 124, 128-34 (5th Cir. Unit B 1983) (en banc) (Fay & Roney, JJ., dissenting). The time thus seems appropriate to decide directly the standard that appellate courts should apply in reviewing *Witherspoon* exclusions.

Although no court previously has explicitly decided the proper standard of review in *Witherspoon* cases, the manner in which appellate courts, including the Supreme Court, have conducted the many reviews that they have made of *Witherspoon* decisions provides guidance for this Court's decision. The predominant if not exclusive method of review undertaken by the federal courts, whether on direct review or in habeas proceedings, has been an independent review, based upon a close study of the voir dire transcript to determine whether a venireperson was improperly excluded from the jury. *See, e.g., Adams v.*

Texas, 448 U.S. 38, 49-51, 100 S.Ct. 2521, 2528-29, 65 L.Ed.2d 581 (1980); *Lockett v. Ohio*, 438 U.S. 586, 595-97, 98 S.Ct. 2954, 2959-61, 57 L.Ed.2d 973 (1978); *Maxwell v. Bishop*, 398 U.S. 262, 264-65, 90 S.Ct. 1578, 1580-81, 26 L.Ed.2d 221 (1970); *Boulden v. Holman*, 394 U.S. 478, 482-84, 89 S.Ct. 1138, 1140-42, 22 L.Ed.2d 433 (1969); *Spencer v. Zant*, 715 F.2d 1562, 1576-77, *reh'g granted en banc*, 729 F.2d 1293 (11th Cir.1983); *King v. Strickland*, 714 F.2d 1481, 1492-93 (11th Cir.1983); *Witt v. Wainwright*, 714 F.2d 1069, 1080-83 (11th Cir. 1983); *Hance v. Zant*, 696 F.2d 940, 954-56 (11th Cir. 1983); *Bell v. Watkins*, 692 F.2d 999, 1006-08 (5th Cir. 1982); *Williams v. Maggio*, 679 F.2d 381, 383-86 (5th Cir.1982) (en banc), *cert. denied*, —— U.S. ——, 103 S.Ct. 3553, 77 L.Ed.2d 1399 (1983); *Alderman v. Austin*, 663 F.2d 558, 562-64 (5th Cir. Unit B 1982), *aff'd in relevant part*, 695 F.2d 124 (1983) (en banc); *Granviel v. Estelle*, 655 F.2d 673, 677-78 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982); *Burns v. Estelle*, 592 F.2d 1297, 1300-01 (5th Cir. 1979), *adhered to en banc*, 626 F.2d 396, 397-98 (1980).

The approach taken by the courts is consistent with the demands of the law. Application of the *Witherspoon* rule involves a mixed question of law and fact, which makes it a determination subject to independent review by an appellate court. *See Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980); *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961); *Brown v. Allen*, 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1953) (Frankfurter, J.); *Hance v. Zant*, 696 F.2d 940, 946-47 (11th Cir.1983); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 n. 19, 102 S.Ct. 1781, 1790-91 n. 19, 72 L. Ed.2d 66 (1982) (citing Supreme Court authority for independent appellate court review of mixed questions of law and fact).

Mixed questions of law and fact involve " 'the application of legal principles to the historical facts of [the] case.' " *Hance*, *supra*, 696 F.2d at 947 (quoting *Cuyler*, *supra*, 446 U.S. at 342, 100 S.Ct. at 1715). " 'Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . the [Federal] Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' " *Id.* (quoting *Brown v. Allen*, 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1953) (Frankfurter, J.)).

The trial judge during voir dire questioning must apply the *Witherspoon* legal standard to the venireperson's responses. He or she must interpret the legal significance of the answers given. The answers alone do not dispose of the issue; the judge must decide whether the responses make unmistakably clear the prospective juror's unbending opposition to capital punishment. Because the trial court undertakes this application of law to fact, the court on appeal must independently review the colloquy preserved in the voir dire transcript to determine whether the trial court correctly applied the constitutional standard to the statements made.[3]

While the appellate court clearly bears the responsibility to review independently the mixed question of fact and law involved in a *Witherspoon* determination and ultimately to decide whether *Witherspoon*'s requirements

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[3] The trial judge's *Witherspoon* exclusion decisions thus are not subject to 28 U.S.C.A. § 2254(d), which provides in federal habeas cases a presumption of correctness to the written findings of fact made by the state trial judge after a hearing on the merits of a factual issue. Mixed questions of law and fact are not subject to this statutory presumption. *Hance v. Zant*, 696 F.2d 940, 946 (11th Cir. 1983) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980)).

were met, that responsibility does not preclude the court on appeal from according deference to the decision of the trial judge who had an opportunity to hear the venireperson's responses and observe their demeanor. *See McCorquodale v. Balkcom*, 721 F.2d 1493, 1498 (11th Cir. 1983) (en banc); *see also O'Bryan v. Estelle*, 714 F.2d 365, 393-96 (5th Cir. 1983) (Higginbotham, J., concurring) independent appellate review to determine whether trial court abused its discretion). Review of the *Witherspoon* questions posed to the veniremembers, because it involves only a determination whether the trial court employed the proper legal standard, remains always a matter exclusively for the court on appeal. Appellate review of the venirepersons' responses to those questions, however, because it involves a determination of the intended meaning of the responses given, as well as application of the appropriate legal standard, may benefit by consideration of the trial judge's interpretation. The court on appeal, thus, should grant deference to the trial judge's assessment of the venirepersons' responses, including the venireperson's demeanor and the clarity of the venirepersons' responses, to questions posed. However, the prescribed independent appellate review of mixed questions of fact and law and *Witherspoon*'s strict rule that venirepersons make unmistakably clear their automatic opposition to capital punishment ultimately require an appellate court to reach its own judgment on the question whether a venireperson was improperly excluded from a jury. *See McCorquodale, supra*, 721 F.2d at 1498.

Application of the Standard. Darden challenges the excusal for cause of venirepersons Varney and Murphy. He maintains that their responses to voir dire questions failed to make unmistakably clear their unbending opposition to capital punishment.

Improper exclusion of even one venireperson is a sufficient basis for granting the habeas petition in this case. *See Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976); *Witt v. Wainwright*, 714

F.2d 1069, 1081 & n. 8 (11th Cir.1983). Careful review of the voir dire transcript in this case reveals that venireperson Murphy was excused in violation of the *Witherspoon* principles. We therefore find it unnecessary to consider whether venireperson Varney also was improperly excused.

Only one question purporting to relate to the *Witherspoon* principles was asked of venireperson Murphy.

> THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable *without violating your own principles* to vote to recommend a death penalty regardless of the facts?
>
> MR. MURPHY: Yes, I have.
>
> THE COURT: All right, sir, you will be excused then.

Record at 165 (emphasis added).

The court in this instance applied the wrong legal standard.[4] The question in a *Witherspoon* inquiry is not whether prospective jurors could vote for the death penalty without violating their principles, but whether, if they have principles against capital punishment, they could put them aside and vote for the death penalty when

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[4] The trial court's misunderstanding of the *Witherspoon* issue is evident at another point in the record. At a conference in chambers with the attorneys and defendant present, the judge said:

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief [sic] he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said that he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it *or if he did follow it, it would be going against his principles*, and, therefore, *I would rule that would be disqualification. If that exists, I intend to disqualify for cause.*

Record at 18.

the law and the facts of the case require it. *Witherspoon* and its progeny explicitly recognize that some jurors, notwithstanding their opposition to capital punishment, would be willing to return a verdict of death, making their scruples subservient to their duty as jurors. *Adams v. Texas*, 448 U.S. 38, 44-45, 100 S.Ct. 2521, 2526, 65 L.Ed. 2d 581 (1980); *Boulden v. Holman*, 394 U.S. 478, 483-84, 89 S.Ct. 1138, 1141-42, 22 L.Ed.2d 433 (1969); *Witherspoon v. Illinois*, 391 U.S. 510, 515-16 n. 9, 88 S.Ct. 1770, 1773-74 n. 9, 20 L.Ed.2d 776 (1968).

The government argues that the question asked of Mr. Murphy and Mr. Murphy's response must be read in light of the trial court's earlier correct statement of the *Witherspoon* issue. If the question directed to the venireman was imperfect, the government maintains that the prior correct statement of the issue cures any *Witherspoon* error.

In determining whether a prospective juror was properly excluded, the court considers the entire voir dire to place in proper context the venireperson's responses. *Witt v. Wainwright*, 714 F.2d 1069, 1083 (11th Cir.1983); *King v. Strickland*, 714 F.2d 1481, 1492-93 (11th Cir. 1983). Just as the Court "does not require that the venireperson utter a pat phrase, the incantation of which magically frees the power of excusal from its yoke of unconstitutionality," *Witt, supra*, 714 F.2d at 1083, so the Court will review the "totality of the circumstances of the voir dire," *id.*, to determine whether the trial court correctly posed the *Witherspoon* questions to the venireperson who was excused.

In the trial of this case, the judge at the start of the voir dire called twelve venirepersons into the jury box.[5] Addressing the people seated in the jury box, the judge then stated:

> THE COURT: Now I am going to ask each of you individually the same question so listen to me

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[5] Record at 30-32.

> carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?

Record at 43.

At the time that this statement was made, Mr. Murphy was not among those seated in the jury box. The statement thus was not even addressed to him. Later in the voir dire—one hundred and twenty-two pages later in the voir dire transcript—Murphy was seated in the jury box, and the improper question was posed to him. In view of this Court's strict adherence to the requirements of *Witherspoon*, *Granviel v. Estelle*, 655 F.2d 673, 677 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982), and the strict requirements of *Witherspoon* itself, we cannot assume that Mr. Murphy heard the correct articulation of the *Witherspoon* standard or that, if he heard it, he remembered it and knew it to be the correct statement of the question when he was later questioned incorrectly.[6]

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[6] Nor can the government find a cure in the *Witherspoon* question posed to Mr. Staha, the venireperson who was questioned immediately before Mr. Murphy. Mr. Staha was asked:

> THE COURT: Do you have any opinion or principles in opposition to the death penalty that are so strong that it would make it impossible *or very difficult* for you to vote to recommend a verdict of a death sentence regardless of what the facts might be?

Record at 160 (emphasis added). This is an incorrect articulation of the *Witherspoon* question because it assumes that a venireperson should be excused if it is only "very difficult" for him or her to vote to recommend death. *See Adams v. Texas*, 448 U.S. 38, 50, 100 S.Ct. 2521, 2529, 65 L.Ed.2d 581 (1980) ("[N]either nervousness,

Witherspoon makes clear that death sentences cannot stand in cases in which venirepersons were excluded on any broader basis than that established by the *Witherspoon* opinion. 391 U.S. at 521-22 n. 21, 88 S.Ct. at 1776-77 n. 21. This firm rule requires that we grant the habeas petition in this case.

The decision to recommend a sentence of death places upon a jury a most awesome responsibility. The trial judge bears the ultimate responsibility to provide each defendant a fair trial and an impartial jury, and the selection of the men and women who serve on the jury in a capital case requires great diligence. Inquiry, on voir dire, as to the prospective jurors' views on the death penalty is a critical inquiry. Improper *Witherspoon* questioning can lead to the unconstitutional exclusion of jurors whose reservations about the death penalty do not disqualify them from service. Should any be so excluded, the death penalty cannot, constitutionally, be imposed, no matter what the evidence may show, for their exclusion denies the defendant an impartial jury and produces instead a jury that is "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521, 88 S.Ct. 1770, 1776, 20 L.Ed.2d 776 (1968).

The *Witherspoon* rule, though articulated over 15 years ago and applied many times by many courts over the course of its life, all too frequently forms the basis for a reversal of a death sentence. State trial courts and federal district courts must exercise greater care to ensure that the Supreme Court's requirements are met. Only a procedure that employs precise questions—questions that clearly pose the twofold *Witherspoon* inquiry set out in footnote 21 of the Supreme Court's opinion—

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emotional involvement, nor inability to deny or confirm any effect whatsoever [of the death penalty on one's deliberations as a juror] is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty.").

and that elicits unmistakably clear answers from each venireperson can satisfy the Court's strict standard.

II. THE PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES

Petitioner also appeals the district court's denial of his request for habeas corpus relief based on his claim of prosecutorial misconduct in the state's closing argument to the jury and his assertion of ineffective assistance of counsel. The en banc court concludes that the panel's evaluation of these issues was correct and reinstates the relevant portion of the panel's opinion, 699 F.2d at 1033-37.

III. CONCLUSION

The district court's denial of the writ of habeas corpus on the basis of its determination under *Witherspoon* is reversed. The State shall be prohibited from carrying out the sentence in this case unless the petitioner is afforded a new sentencing hearing within a reasonable time to be fixed by the district court. The district court's denial of habeas relief on the basis of its review of petitioner's claims of prosecutorial misconduct and ineffective assistance of counsel is affirmed. The case is remanded for proceedings not inconsistent with this opinion.

REVERSED in part; AFFIRMED in part; REMANDED.

TJOFLAT, Circuit Judge, dissenting:

The court today violates the Supreme Court's "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), by entertaining the merits of a habeas corpus petition that presents both exhausted and unexhausted claims. I therefore dissent.

I.

28 U.S.C. 2254(b) and (c) (1976) states:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court *shall not be granted* unless it appears that the applicant *has exhausted* the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant *shall not be deemed* to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. (emphasis added).

In *Galtieri v. Wainwright* this court held, en banc, that "a federal district court must dismiss without prejudice a 'mixed' petition for a writ of habeas corpus [i.e., one containing both exhausted and unexhausted claims] filed by a state prisoner" [1] and that state habeas corpus "petitioners must present *all* their claims to the state court system before turning to the federal courts." [2] The Supreme Court subsequently held in *Rose v. Lundy* that federal district courts must dismiss mixed petitions summarily,[3] and that federal courts of appeals may not re-

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[1] 582 F.2d 348, 355 (5th Cir. 1978), citing *West v. Louisiana*, 478 F.2d 1026, 1034 (5th Cir. 1973), *aff'd regarding exhaustion en banc*, 510 F.2d 363 (5th Cir. 1975). In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[2] 582 F.2d at 351.

[3] Justice O'Connor, speaking for the Court, explained the "rigorously enforced total exhaustion rule," 455 U.S. at 518, 102 S.Ct.

view any claims that have been presented in a mixed petition to the district court.

The district court in this case was bound by the statute and our holding in *Galtieri*.[4] Nevertheless, the district court entertained, on the merits, a twenty-six count petition containing a plethora of unexhausted claims.[5] *See infra* at 1534-1536. The panel that initially considered this appeal was precluded by *Rose* and the statute from considering the merits of any of petitioner's claims. Like the district court, the panel ignored its clear duty to dismiss the petition for want of exhaustion. Today the court, sitting en banc, repeats this error.

II.

The record shows that, after his trial, petitioner unsuccessfully brought eight claims of error on direct appeal to the Florida Supreme Court,[6] and three claims

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at 1203, in parts III A and B of her opinion. She was joined in those sections by Chief Justice Burger and Justices Rehnquist and Powell. Justice Brennan, joined by Justice Marshall, concurred in the rule, *id.* at 532, 102 S.Ct. at 1210 ("I agree with the Court's holding that the exhaustion requirement of 28 U.S.C. § 2254(b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts."). Justice White agreed with Justice Blackmun's concurrence in the judgment, which opined that a district court need not dismiss every mixed petition, but could consider exhausted claims. Justice Stevens dissented.

[4] The district court's order preceded *Rose v. Lundy* by 10 months.

[5] Judge Fay, *infra* at 1551, states that the petitioner has exhausted all his state remedies. I suggest that the record is to the contrary. *See infra* notes 9-13 and accompanying text.

[6] According to the Florida Supreme Court, petitioner alleged the following grounds for reversal: (1) the racial composition of the jury venire was improper; (2) improper exclusion of prospective jurors because of their expressed attitudes toward the death penalty; (3) the alleged unconstitutionality of the sentencing

on collateral attack.[7] The Florida Supreme Court's opinions disposing of these appeals do not indicate whether petitioner presented these claims of error under the federal Constitution or state law.[8] In any event, the Florida Supreme Court rejected these claims.

On May 21, 1979, petitioner commenced these habeas corpus proceedings in the district court. His petition contained two federal constitutional claims: (1) prosecutorial misconduct and (2) improper pretrial identification. The State answered his petition on May 22, and conceded that these two claims had been exhausted. On July 5 the State moved the court for leave to propound interrogatories to petitioner, indicating that in order to

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provisions of the applicable Florida statutes; (4) the State's eliciting from a State witness a comment regarding other murder cases in which petitioner was a suspect; (5) and (6) in-court identifications by two victims were tainted by improper pretrial show-ups; (7) erroenous admission into evidence of a gun allegedly used by petitioner in committing the holdup and murder; and (8) prosecutorial misconduct concerning closing argument. *Darden v. State*, 329 So.2d 287, 288 (Fla. 1976).

[7] Petitioner collaterally attacked his conviction under Fla.R.Crim. P. 3.850 (1984), alleging ineffective assistance of counsel and newly discovered evidence. *Darden v. State*, 372 So.2d 437 (Fla. 1979). Additionally, he attacked the executive department's clemency procedures in a separate suit. *Darden v. Graham*, 372 So.2d 436 (Fla. 1979). The Florida Supreme Court rejected all three claims on the merits.

[8] The record does not contain the briefs the petitioner and the State filed with the Florida Supreme Court in these appeals; thus we have no definitive means of determining whether petitioner's claims of error were grounded on federal or state law. This problem would not have arisen had the Florida Attorney General complied with his duty under the federal habeas corpus rules by attaching copies of petitioner's briefs to the Florida Supreme Court to his answer to petitioner's habeas petition. *See* rule 5, Rules Governing § 2254 cases, 28 U.S.C. foll. § 2254 (1976); "If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer."

avoid abuse of the writ problems "now is the proper time to fully litigate and resolve all justiciable issues . . . petitioner would be well advised to present all claims at this time . . . ."[9] Petitioner answered the interrogatories and amended his petition to add an ineffective assistance of counsel claim under the sixth and fourteenth amendments. On September 7 petitioner supplemented his answer to the State's interrogatories, listing twenty-three additional federal constitutional claims, for a total of twenty-six.[10] The parties then stipulated on

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[9] This is a tactic the State should have pursued in the state collateral attack court, since under the exhaustion doctrine the state courts have the initial responsibility to address and dispose of a petitioner's federal constitutional attack on his conviction. *See infra* text at 1536-1539.

[10] The first three claims, stated in the original petition or by the initial amendment, were (1) prosecutorial misconduct, primarily in closing argument; (2) improper pretrial identifications; and (3) ineffective assistance of counsel. The remaining claims, stated in the interrogatories, were (4) that petitioner's execution would constitute excessive punishment in violation of due process and the eighth amendment because the justifications asserted to support the death penalty were insufficient to take his life; (5) the death sentence violated the eighth amendment because it would inflict unnecessary pain and torment; (6) prosecutorial misconduct in the penalty phase; (7) petitioner's counsel rendered ineffective assistance of counsel at the penalty stage of his trial; (8) petitioner's execution would violate due process and equal protection because the Office of Executive Clemency operated in an unfair, irregular, and arbitrary manner; (9) the jury was selected using procedures that systematically excluded persons having conscientious or religious scruples against the death penalty; (10) petitioner's sixth amendment rights were violated because persons with scruples against the death penalty were excluded from the jury so that it did not represent a cross-section of the community; (11) because of petitioner's poverty he was denied the opportunity to prepare and present evidence against the death penalty; (12) petitioner was not given adequate notice or opportunity to present evidence and argument addressed to the sentence; (13) petitioner was denied timely notice of, and fair opportunity to meet, prejudicial evidence presented at his penalty trial; (14) the sentence was based upon facts not established beyond a reasonable doubt; (15) because of

September 14 that the twenty-three additional claims should be included in petitioner's habeas petition. On the same day the magistrate to whom the district court had referred the case entered an order noting that "[t]he Petitioner has added additional claims for habeas corpus relief without objections of the [State], and [the State] has waived any claim that Petitioner has failed to exhaust state court remedies as to any claims presented." The State then answered these claims on the merits. The magistrate, and subsequently the district court, addressed each of petitioner's claims on the merits.

Assuming that the eleven claims petitioner presented to the Florida Supreme Court on direct appeal and on collateral attack were claims of federal constitutional error,[11] petitioner raised three types of claims in the district court: claims presented on the merits to the state

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petitioner's poverty he was denied a chance to present a defense to the capital charge; (16) the grand and petit juries were selected through procedures which systematically excluded racial minorities from jury service; (17) considering the circumstances of the offense and offender, the death penalty was grossly disproportionate and excessive; (18) petitioner's death sentence was the result of the selective prosecution in Polk County and the Tenth Judicial Circuit of capital defendants who refused to plead guilty; (19) petitioner's sentence was imposed pursuant to a system of arbitrary and capricious capital sentencing; (20) his sentence was imposed pursuant to racial discrimination in capital sentencing; (21) his sentence was imposed pursuant to wealth discrimination in capital sentencing; (22) his sentence was imposed pursuant to gender discrimination in capital sentencing; (23) given the circumstances surrounding petitioner and his offense, the sentence imposed was disproportionate and excessive when compared to similar cases; (24) the Florida Supreme Court denied petitioner notice and opportunity to be heard concerning its proportionality review of his sentence and because of his indigency denied him facts regarding similar cases; (25) because of his indigency the state denied petitioner opportunity for commutative relief; and (26) petitioner was legally incompetent [time unspecified] and the state denied him funds to prove same.

[11] *See supra* note 8 and accompanying text.

courts and exhausted;[12] claims not presented to the state courts but—because of some sort of procedural abandonment—no adequate state remedy remained;[13] and claims not presented to the state courts for which state court adjudication on the merits remained available.[14] The district court could properly entertain the first and second categories of petitioner's claims if they were all the petition contained. 28 U.S.C. § 2254(b) (1976). The petition, however, contained claims from the third category. These claims, at least nine in number, were unexhausted and would have presented a justiciable controversy in the state courts. The petition was thus a "mixed" one. Anything but a summary dismissal of a mixed petition disregards *Rose v. Lundy*, the statute, and

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[12] *See supra* note 10 claims 1-3, 6-8.

[13] This type of claim is usually one that is not adequately preserved at trial, or is abandoned by failure to bring it on appeal. In either case, the state courts generally will not hear the claim further. *See, e.g., Hargrave v. State*, 396 So.2d 1127 (Fla. 1981); Fla.R.Crim.P. 3.850 (1984). A Florida court will not recognize such a procedurally defaulted claim and grant relief thereon; therefore, a federal district court may hear such a claim on habeas without the petitioner first presenting the claim to state court. *See* § 2254(b) ("absence of available State corrective processes . . ."). *Accord, Engle v. Isaac*, 456 U.S. 107, 125 n. 28, 102 S.Ct. 1558, 1570 n. 28, 71 L.Ed.2d 783 (1982). *See also Galtieri*, 502 F.2d at 354. Of course, no habeas petitioner may bring a procedurally defaulted claim into federal court without showing cause and prejudice under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) and its progeny. *See, e.g., Isaac, supra*, 456 U.S. at 129, 102 S.Ct. at 1572 ("when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice").

The habeas petition in this case alleged a number of claims not presented to a state court but permissible under § 2254(b)—with a showing of cause and prejudice—because no adequate state remedy existed at the time of filing. *See supra* note 10 (claims 4-5, 9-16, and possibly claim 18).

[14] *See supra* note 10 (claims 17, 19-26, and possibly claim 18).

the compelling policy arguments behind the statute. This Court has placed itself in the same posture as the Sixth Circuit, which was reversed in *Rose v. Lundy*.

III.

The plain words of sections 2254(b) and (c) and *Rose v. Lundy* forbid the entertainment of petitioner's appeal on the merits. *See* discussion *infra* text at 1543-1544. Moreover, the express language of the statute and *Rose* leave no room for a state attorney general's waiver of exhaustion. *But see Thompson v. Wainwright*, 714 F.2d 1495, 1497 (11th Cir.1983). *See* discussion *infra* text at 1539-1543. It is true that the drafters of the statute and the authors of *Rose*, and *Galtieri*, did not expressly consider whether a state attorney general could waive the exhaustion requirement found in sections 2254(b) and (c); the policy reasons behind the exhaustion rule preclude such a waiver, however, and require us to dismiss the petition.

Exhaustion in state prisoner habeas proceedings was developed a century ago as a consideration of comity, an equitable notion that federal courts hearing state prisoner claims should exercise discretion

> in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.

Ex parte Royall, 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed. 868 (1886). The courts later refined this concept into the rule that state remedies must be exhausted except in certain limited circumstances. *See Rose*, 455 U.S. at 515, 102 S.Ct. at 1202 (citing cases). In 1948, Congress codified this rule in 28 U.S.C. § 2254. The ex-

haustion rule found in sections 2254(b) and (c), based on notions of comity, places limitations on the federal courts' exercise of habeas corpus jurisdiction. It states:

> (b) *An application for a writ . . . shall not be granted* unless it appears that the applicant has exhausted . . . .
>
> (c) An applicant *shall not be deemed* to have exhausted . . . if he has the right under the law of the State to raise, *by any available procedure*, the question presented. (emphasis added).

These limitations are cast in mandatory, obligatory language. Following a total exhaustion rule does more than further notions of comity, it complies with the dictates of Congress.

Congress codified the exhaustion rule because of the advantages it presents in managing our dual court systems. Exhaustion of state remedies furthers federalism by maintaining the delineation between federal and state court systems and ensuring federal respect for state courts. Comity has been defined as giving proper deference to states,[15] but comity in a federal system cuts both ways; the states may not impose on the federal courts the primary task of reviewing its criminal convictions. The exhaustion rule furthers the efficient working of both federal and state courts.

A. *The Exhaustion Rule and State Courts*

The strict exhaustion rule defined by *Rose v. Lundy* furthers a number of interests of the state court systems.

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[15] *Thompson* discussed comity as it served "the interests of the state and its sovereignty. . . ." 714 F.2d at 1506. *Rose*, however, described the role of exh ion in "protect[ing] the state *courts'* role in the enforcement of federal law and . . . state *judicial proceedings*." 455 U.S. at 518, 102 S.Ct. at 1203 (emphasis added). *See, e.g., Thompson*, 714 F.2d at 1507 n. 11; *Rose*, 455 U.S. at 518, 102 S.Ct. at 1203 (1982).

First, it pays great respect to state courts, recognizing the integrity of the state court system and its need to assure a complete disposal of each case presentable to it. State judges, just like federal judges, are sworn to uphold the Constitution. The exhaustion rule recognizes this fact by permitting the state system to be the first to adjudicate on the merits each claim a petitioner may later seek to bring into federal court.

Second, exhaustion ensures that state courts may entertain and decide constitutional claims without interference by federal district courts.[16] *See Duckworth v. Serrano*, 454 U.S. 1, 2, 102 S.Ct. 18, 19, 70 L.Ed.2d 1 (1981) (per curiam) (exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights"). As the Supreme Court stated in *Engle v. Isaac*, 456 U.S. 107, 128, 102 S.Ct. 1558, 1571, 71 L.Ed.2d 783 (1982), "[t]he States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith efforts to honor constitutional rights." *Cf. Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (federal court must normally abstain from

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[16] Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518, 102 S.Ct. at 1203, citing *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950).

deciding issues implicated in ongoing criminal proceedings in state court).

Third, exhaustion enables state courts to address the prisoner's claims in light of state evidentiary, procedural, and substantive law. This permits the courts to ensure a uniform and accurate application of state law, which in many instances may remove the federal constitutional claims altogether. Even where state law is not dispositive of the case, it is still preferable for the state courts to act first. This enables them to become increasingly familiar with and hospitable toward federal constitutional issues.[17] The need for state court familiarity with federal constitutional principles has grown especially acute given the marked development of criminal procedural rules in recent times.[18]

Finally, the total exhaustion required by *Rose v. Lundy* enhances the possibility that the state court will satisfactorily resolve the petitioner's constitutional claims and bring his criminal case to a close. Such finality not only preserves the dignity of state courts, but aids deterrence, and assists rehabilitation. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 146 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 444-62 (1963). It also reduces some of the "significant costs" of the Great Writ.[19]

B. *The Exhaustion Rule and Federal Courts*

Federalism is a two-way street. The concepts of comity and federalism behind the exhaustion rule benefit federal

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[17] *Rose*, 455 U.S. at 519, 102 S.Ct. at 1203-04; *Galtieri*, 582 F.2d at 354 (without exhaustion "state court system would be isolated from federal constitutional issues and would not have an impetus to develop and apply federal constitutional law").

[18] *Accord, Isaac*, 456 U.S. at 128 n. 33, 102 S.Ct. at 1571 n. 33.

[19] "We have always recognized . . . that the Great Writ entails significant costs." *Isaac*, 456 U.S. at 126, 102 S.Ct. at 1571.

courts as well as state courts.[20] The rule requires a petitioner first to flush out all of his claims in state court, either on direct appeal or collateral attack. Collateral attacks usually occur relatively close in time to the trial;[21] memories are sharper, and witnesses and evidence are more likely to be available. Thus by the time a petitioner's constitutional claims reach federal court, the historical facts that underpin his claims should have been ascertained. *Accord*, *Rose*, 455 U.S. at 519, 102 S.Ct. at 1203-04. The state court's findings of fact are so important to the federal courts that they will be presumed correct, and may well avoid the need for an evidentiary hearing in the district court. 28 U.S.C. § 2254 (d) (1976). This is precisely the opposite of what happened in the case before us. The state courts had no chance to develop the facts that gave rise to many of petitioner's claims because these claims did not materialize until petitioner arrived in federal court.

The federal courts also benefit from state court treatment of federal constitutional claims in their established factual setting. Such treatment obviously reduces the

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[20] *Thompson* failed to acknowledge this point; it only analyzed the exhaustion principle in depth from the standpoint of state courts. *See* 714 F.2d at 1505-07.

[21] In capital cases, however, the collateral attack is usually delayed until a death warrant issues, scheduling the prisoner's execution. In this case, petitioner was convicted in 1974, but the Governor did not issue the death warrant until 1979. The Florida collateral attack rule, Fla.R.Crim.P. 3.850 (1983), allowed petitioner to challenge his conviction and death sentence "at any time." Most likely, he waited until the eleventh hour to challenge his conviction in the state courts, and then in the district court, because he thought this would give him the best chance to obtain a stay of his execution. Moreover, the more complicated a petitioner's claims are, especially if they need an evidentiary hearing to be resolved, the greater the chance is that a stay will be forthcoming, at least until his claims are determined.

potential for erroneous decision making at the federal level, and thus improves the quality of justice.[22]

The total exhaustion of a petitioner's claims should lessen the number of his claims that reach the district court. State courts will ferret out and identify the patently meritless claims. Some federal constitutional claims will be decided on the merits for petitioner and thereby precluded from habeas corpus review. Still others will be decided for the petitioner upon adequate state law grounds. In this last instance, the result of strict exhaustion is akin to *Pullman* abstention,[23] which enables a federal court to avoid the constitutional adjudication of the validity of state law if the law can be read by the state courts to eliminate the constitutional question from the case.

The total exhaustion rule of *Rose* aids the district courts because it is far easier and more efficient to administer than a rule, such as the one promulgated by *Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir. 1983), and *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), which authorizes a district court to entertain a mixed petition whenever the State waives the exhaustion requirement and the court is inclined to hear the merits of the petitioner's claims. *See infra* text at 1540-1543. First, the total exhaustion rule is easy for habeas petitioners to follow. As the Court stated in *Rose*: "§ 2254

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[22] *Cf.* Hill & Baker, *Dam Federal Jurisdiction!*, 32 Emory L.J. 3, 80 (1983):

> We submit that no federal jurist would seriously maintain that the federal courts are quite adequate to the enforcement of constitutional guarantees and that state courts are not needed. Therefore, it is important that whatever cleavage may have developed be bridged as soon as possible. This will require that the state courts assume full responsibility in these areas and that the federal courts recognize the important role of the States . . . .

[23] *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

(b), (c) [provides] a simple and clear instruction to potential litigants: before you bring *any* claims to federal court, be sure that you first have taken *each* one to state court." 455 U.S. at 520, 102 S.Ct. at 1204 (emphasis added). The rule also provides a clear instruction to magistrates and district court judges: mixed habeas petitions must be dismissed summarily. *See id.* at 520, 102 S.Ct. at 1204 (requiring "strict enforcement of the exhaustion requirement"); *id.* at 527, 102 S.Ct. at 1207 (Blackmun, J., concurring in judgment) (interpreting majority to hold that district court must dismiss entire petition); *see also Galtieri*, 582 F.2d at 355-56. As Justice Brennan stated in his partial concurrence in *Rose*, "the exhaustion requirement of 28 U.S.C. §§ 2254 (b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts . . . ." [24]

This simple, clear, and unyielding rule, when combined with habeas rule 9,[25] means that in the great majority of cases a petitioner must swiftly bring all his claims to the district court in one petition, and all the claims must be exhausted. *Galtieri*, 582 F.2d at 356-358. These claims, presented first in state court, are likely to be well focused and developed, and the district court can swiftly and accurately adjudicate all constitutional issues. As the *Rose* Court said, "[r]ather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." [26] A rigorously enforced exhaustion requirement, when combined

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[24] 455 U.S. at 532, 102 S.Ct. at 1210. (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part).

[25] Rule 9, Delayed or Successive Petitions, Rules Governing § 2254 Cases. 28 U.S.C. foll § 2254 (1976).

[26] 455 U.S. at 520, 102 S.Ct. at 1204.

with habeas rule 9, will reduce piecemeal litigation, and "both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review." [27] As the en banc court said in *Galtieri*, "[c]onsiderations of comity,[28] avoidance of piecemeal litigation, economy of judicial energy, and the fullest consideration of a petitioner's claims are best served if all of a petitioner's claims are presented to the state court system at one time." 582 F.2d at 356.

C. *Waiver of Exhaustion*

Two recent decisions of this court have placed the eleventh circuit among the minority of federal judicial circuits that permit the district court or the court of appeals to entertain on the merits a mixed petition whenever the State's counsel (usually the attorney general) explicitly waives the petitioner's failure to exhaust all of his claims. *Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir.1983); *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir.1983).[29] With due respect to the panels in those

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[27] *Id.*

[28] One of the economics of the total exhaustion rule is that the district court should be spared the often difficult task of determining, for example, whether, under the *Thompson-Westbrook* rule, *see infra* text at 1539-1543, it should entertain a mixed petition, or whether there has been an abuse of the writ or undue delay within the meaning of Rule 9, 28 U.S.C. foll. § 2254 (1976). This latter determination may require an evidentiary hearing. *See, e.g., Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1973).

[29] *See also Lamb v. Jernigan*, 683 F.2d 1332, 1325 n. 1 (11th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). The fourth circuit also permits explicit waiver. *Sweezy v. Garrison*, 694 F.2d 331, 333 (4th Cir. 1982) (per curiam), *cert. denied*, —— U.S. ——, 103 S.Ct. 1882, 76 L.Ed.2d 812 (1983). The fifth circuit seems to have not yet made up its mind, although

cases, their holdings were plainly foreclosed by *Rose v. Lundy*. Today's case presents this court with an opportunity to set aside those holdings and bring this circuit into compliance with the law.

Thompson held that a district court could, in its discretion, accept or reject the State's waiver of exhaustion. *Thompson* relied in part on *Westbrook*; it also cited a number of our cases, including prior fifth circuit opinions, in which we considered mixed petitions on the strength of the State's explicit or implicit waiver of exhaustion. 714 F.2d at 1501. The *Thompson* court, in particular, proceeded on the assumption that *Rose* had not decided the waiver question and reasoned that because comity, the basis for exhaustion, was founded on the relation between federal courts and the states (not merely state courts), comity would not be injured by per-

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the *Thompson* panel indicated otherwise, 714 F.2d at 1502. *Compare Felder v. Estelle*, 693 F.2d 549, 554 (5th Cir. 1982) (citing *Galtieri* permitting explicit waiver) *with Scott v. Maggio*, 695 F.2d 916, 919 n. 4 (5th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983) (not clear after *Rose* whether waiver permissible). Courts of Appeal for the first, second, third, sixth, and tenth circuits have refused to permit waiver. *E.g. Bowen v. Tennessee*, 698 F.2d 241, 243 (6th Cir. 1983) (en banc); *Navanjo v. Ricketts*, 696 F.2d 83, 87 (10th Cir. 1982) (per curiam); *Slotnick v. O'Lone*, 683 F.2d 60, 61 (3d Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1206, 75 L.Ed.2d 447 (1983); *Sostre v. Festa*, 513 F.2d 1313, 1314 n. 1 (2d Cir.), *cert. denied*, 423 U.S. 841, 96 S.Ct. 72, 46 L.Ed.2d 60 (1975); *Needel v. Scafati*, 412 F.2d 761, 766 (1st Cir.), *cert. denied*, 396 U.S. 861, 90 S.Ct. 133, 24 L.Ed.2d 113 (1969). The Seventh Circuit has all but adopted a no-waiver rule. *Mattes v. Gagnon*, 700 F.2d 1096, 1098 n. 1 (7th Cir. 1983) (federal habeas court must consider exhaustion even if not raised by parties). *See also Ventura v. Cupp*, 690 F.2d 740, 741 (9th Cir. 1982) (per curiam) (district court must dismiss unexhausted petition unless petitioner shows no other remedies or good cause); *Batten v. Scurr*, 649 F.2d 564, 567-68 (8th Cir. 1981) (court will not raise exhaustion when state conceded exhaustion, considerable time invested in case, and exhaustion not challenged in appeals court).

Of the foregoing cases, all are post-*Rose* with the exception of *Sostre*, *Needel*, and *Batten*.

mitting the attorney general to waive exhaustion on behalf of the State. The court perceived no injury because the Florida Attorney General, as " 'the chief state legal officer' of the executive department," had the authority to speak for the state and for its court system, as well.

To me, the *Thompson* rationale is contrary to the clear import of *Rose*, *Galtieri*, and the statute. Moreover, it will lead district courts to disregard the policies behind the exhaustion rule, and it will create mischief of its own accord.

First, I see no room in *Rose*, or *Galtieri*, for *Thompson*. Nowhere in any of the *Rose* opinions, even the dissent, is there even a hint that waiver is permissible. The *Rose* majority described its rule as a "rigorously enforced total exhaustion rule." 455 U.S. at 518, 102 S.Ct. at 1203. *Thompson*, however, holds that a district judge may enforce the rule only when he sees fit, 714 F.2d at 1509; thus, the rule will become neither rigorously enforced nor total. Justice O'Connor, for the *Rose* majority, and Justice Brennan, partially concurring, read the total exhaustion rule as requiring an immediate *sua sponte* dismissal of a mixed petition [30] and *none* of the other opinion writers in *Rose* differed with that view of the rule. Under *Thompson*, though, a district court is not required to dismiss a mixed petition *sua sponte*; rather, it may await the attorney general's decision whether to insist on prior state court consideration of the unexhausted claims. If the attorney general decides to waive exhaustion, the district court must then ad-

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[30] *See supra* note 24 and accompanying text. The seriousness with which the Supreme Court views the exhaustion requirement is also evident from *Anderson v. Harless*, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982), *rev'g* 664 F.2d 610 (6th Cir. 1982), where the Court granted certiorari and reversed on exhaustion alone. *See* 459 U.S. at 8, 103 S.Ct. at 280 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). *See also Duckworth v. Serrano*, 454 U.S. 1, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981) (seventh circuit, when presented with obvious constitutional claim, should have dismissed because claim unexhausted).

dress the question of whether it will keep the case or dismiss it.

The *Thompson* rule is also contrary to the statute, which limits the availability of relief to exhausted petitions and orders that no petition may be "deemed" exhausted unless there are no state remedies or other processes available to protect the petitioner's rights. 28 U.S.C. § 2254(b) & (c) (1976). As the third circuit held in *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 96 (3d Cir.1977), *cert. denied*, 435 U.S. 928, 98 S.Ct. 1499, 55 L.Ed.2d 524 (1978), "neither concession nor waiver relieves the federal court of its responsibility to decide only those habeas claims Congress has authorized it to hear under § 2254(b). . . . 'Waiver,' like 'concession,' is not a talisman, the incantation of which will cause the exhaustion requirement to disappear. That requirement remains." [31]

The waiver of exhaustion idea endorsed by *Thompson* is flatly refuted by *Bergman v. Burton*, 456 U.S. 953, 102 S.Ct. 2026, 2027, 72 L.Ed.2d 478 (1982), a post-*Rose* decision. In that case the district court dismissed without prejudice an unexhausted claim from a two-claim mixed petition. The State did not contest, either in the district court or the court of appeals, the district court's authority to adjudicate the merits of the exhausted claim. *See Burton v. Bergman*, 649 F.2d 428, 429 (6th Cir. 1981). Nonetheless, the Supreme Court, *sua sponte*, vacated the court of appeals' judgment on the merits and remanded for dismissal in light of *Rose*. *See* discussion *infra* text at 1544. The *Thompson and Westbrook* panels did not consider this case.[32]

It is clear that *Rose* bars *all* mixed petitions. Even if *Rose* left the question open, there are manifold policy

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[31] This strong admonition, of course, is even more cogent after *Rose*.

[32] *Thompson* and *Westbrook* also did not address the similar cases discussed *infra* text at 1544.

reasons why we should enforce this rule. First, *Rose* defined the exhaustion doctrine as one designed to aid state *courts*, not states generally. This much the *Thompson* panel conceded. 714 F.2d at 1507 n. 11. A state attorney general's decision to waive the exhaustion requirement may not always be compatible with the interests of his own courts; this is no doubt why *Rose* provides no accommodation for an attorney general's waiver. In a capital case, for example, where a death warrant has been issued and the petitioner's execution is scheduled to take place in a matter of days, perhaps even hours, the attorney general, in the hope of avoiding a postponement of the execution, may "waive" the petitioner's failure to exhaust all of his claims so that the petitioner's case may be concluded and he can be executed.[33] This is what happened in this case; the attorney general "waived" the formal exhaustion of at least nine claims.

While such a tactic may suit the attorney general's and the State executive department's needs of the moment, it is likely to have a pronounced adverse effect on the needs of the *state courts*. *See Galtieri*, 582 F.2d at 358. By countenancing such a tactic, the district court may be interpreted as harboring a lack of respect toward the state judicial system and the view that state judges are not as capable of rendering correct constitutional decisions as are federal judges. As Professor Bator has noted, "nothing is more subversive of a [state] judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by [the federal court]." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.

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[33] In noncapital cases the attorney general may have just the opposite incentive. If it is in his interest to delay as long as possible the petitioner's release from custody on a federal habeas writ, the attorney general will likely urge the district court to dismiss the petition for want of exhaustion.

L.Rev. 441, 451 (1963). The district court also removes the state court as the primary locus for factfinding in post-conviction relief.[34]

A second policy reason for requiring total exhaustion is that it will allow state courts to become more familiar and hospitable to constitutional claims of prisoners. In this circuit, for example, we have recently articulated new standards for judging sixth and fourteenth amendment ineffective assistance of counsel claims.[35] Were we now to commence entertaining such claims without exhaustion, we would deprive the state courts of the opportunity of becoming familiar with them and, moreover, of disposing of them on state substantive or procedural grounds.

Third, waiver damages the concept of finality in the state court system, with concurrent injury to the rehabilitation and general deterrence purposes of sentencing.[36] *See supra* text at 1537. The Supreme Court has

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[34] Judge Hill and Professor Baker have observed this fact in arguing the need for more federal deference to state court decision making:

> [T]he protection of the constitutional rights of the citizens is not, ought not be, and cannot be the exclusive business of the federal courts. There simply are not enough federal judges and federal courts to see to the protection of all the people and all their rights. That is reason enough for the fact that state jurists are obligated to apply federal law and federal constitutional guarantees in their work. Indeed, how else can one expect the state judiciary to identify with and protect federal rights than by having a hand in their evolution?

Hill & Baker, *supra* note 22, at 79.

[35] *See Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *cert. granted*, —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983).

[36] In *Galtieri* we noted a similar difficulty caused by mixed petitions. When a prisoner is required to be brought before a federal tribunal only once there is less disruption in his custodial status. We noted that complete exhaustion lessened the possibility of intermittent interruptions of a petitioner's prison sentence, thus

admonished the federal habeas courts not to "detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), cited in *Galtieri*, 582 F.2d at 359.

Fourth, permitting the district courts to litigate mixed petitions may impair the quality of constitutional decision making. A petitioner's mere inclusion of unexhausted claims, especially a proffer of evidence in support thereof, might influence the district court's resolution of the exhausted claims. *Accord*, *id.* Such a scenario cannot occur if the district courts dismiss mixed petitions *sua sponte*, as mandated by *Rose*.

A fifth reason for requiring total exhaustion is to avoid the type of selective waiver by attorneys general permitted by *Thompson* and *Westbrook*. If the petition is assigned to a district judge with whom the attorney general is comfortable, a waiver will be likely;[37] if not, the attorney general may decide to move for dismissal for lack of exhaustion. Such subtle "judge shopping" would be unseemly at best. Any rule that would countenance it, however, tacitly, deserves exacting scrutiny.

I foresee other shortcomings with the *Thompson-Westbrook* approach. One is that the entertainment of mixed petitions will, in time, promote substantial side issues, under habeas rule 9, concerning delayed and successive positions. Assume that the petitioner brought a total of five claims, with only three exhausted. If previously the attorney general had consistently waived exhaustion but declined to do so in this case, the petitioner, if he desired to go forward with his exhausted claims, would have to amend his petition to dismiss the two unexhausted claims. Later, when he returned to the district court after ex-

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aiding the state's correctional system, especially its rehabilitative programs. 582 F.2d at 360.

[37] Under *Thompson's* rationale, the district judge may have discretion not to accept the waiver, in which event he would, presumably, dismiss the mixed petition.

hausting the two claims, petitioner might well have a valid defense to the State's assertion under habeas rule 9 that his claims were successive or unduly delayed. He would contend that his new petition should not be deemed successive because it was caused by a reasonable reliance on the attorney general's waiver policy. He would contend that he should not be barred by delay because "the state, having [earlier] had notice of the claims, cannot establish prejudicial delay." *Galtieri*, 582 F.2d at 358.

These rule 9 issues often involve difficult questions of fact, *see Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); the ones I have posed above could be quite time consuming. A policy that invites a petitioner to prosecute successive petitions, each asserting newly exhausted claims, not only impedes the orderly and complete consideration of his case in state court, it greatly impairs the efficiency of the federal habeas court to dispose of his claims. The *Thompson-Westbrook* rule also enables a district judge to hear both exhausted and unexhausted claims, even when the petitioner's unexhausted claims ought to be handled by the state court first.[38] A rigorously enforced total exhaustion rule would remove the judge's temptation to hear the case.

D. *Noticing Exhaustion on Appeal*

Galtieri held that the policy considerations counselling total exhaustion at the district court level were outweighed when this court was presented on appeal with exhausted claims from a mixed petition. We therefore declined to endorse a rule requiring dismissal on appeal of claims from a mixed petition, 582 F.2d at 361, adopting

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[38] For example, the unexhausted claims may involve novel questions of state law, better handled in state court, which may be dispositive of the petitioner's case. Such a case was presented to the district court in *Washington v. Strickland*, 693 F.2d 1243, 1265 (5th Cir. Unit B 1982) (en banc) (Tjoflat, J., concurring), cert. granted —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983).

instead a flexible approach that would allow us to pass on the merits of the petitioner's exhausted claims. This holding of *Galtieri* is no longer correct.

Rose v. Lundy commands "strict enforcement of the exhaustion requirement," 455 U.S. at 520, 102 S.Ct. at 1204, at *all* levels of habeas litigation and permits no flexibility. In his concurrence in the *Rose* judgment, Justice Blackmun noted that the appellate portion of *Galtieri* was inconsistent with the mandate of *Rose*. He stated, *id.* at 529 n. 7, 102 S.Ct. at 1209 n. 7;

> Even the Fifth and Ninth Circuits, which require dismissal of mixed habeas petitions in the typical case, do not follow the extreme position the Court takes today. . . . The Fifth Circuit will review the merits of exhausted claims contained in a mixed petition if the District Court has considered those claims.

See Galtieri v. Wainwright, 582 F.2d 348, 361-362 (5th Cir.1978) (en banc). Justice Blackmun's reading of *Rose* and *Galtieri* is correct. After *Rose* we may no longer review exhausted claims from a mixed petition.

The strong medicine *Rose* prescribes is quite understandable and, when one carefully considers the policies it seeks to vindicate, quite reasonable. This medicine was prescribed to bring an abrupt halt to the practice of the litigation of mixed petitions. In *Galtieri*, we instructed the district courts not to hear them. At the same time, we said that if they did hear and decide them, we would entertain them on appeal. As it turned out, we thus provided an atmosphere for the ad hoc litigation of mixed petitions and the *sub rosa* disregard of the very policies that we, in *Galtieri*, and the Supreme Court, in *Rose*, sought to further.

To "strictly enforce" *Rose*'s total exhaustion requirement and properly supervise the processing of habeas petitions by district courts in this circuit, we are bound to notice the lack of exhaustion *sua sponte* on appeal and to

order the dismissal of mixed petitions. Any lesser course of action will not provide the rigor demanded by *Rose*, and will result in the continuing disregard of exhaustion policies that *Galtieri* seems to have spawned. The Supreme Court in *Isaac*, 456 U.S. at 123 n. 25, 102 S.Ct. at 1569 n. 25, strongly intimated that an appellate court that encounters an unexhausted claim is bound by *Rose* to dismiss the entire habeas petition.[39] *Accord*, *Bowen v. Tennessee*, 698 F.2d 241 (6th Cir.1983) (en banc); *see also United States ex rel. Lockett v. Illinois Parole and Pardon Board*, 600 F.2d 116, 118 (7th Cir.1979) ("We conclude that there is no bar to our raising the issue of exhaustion on our own, although it has not been raised by the State either in the district court or in the briefs on appeal.") *See* discussion of *Bergman v. Burton*, *infra* text at 1544; *see also Mattes v. Gagnon*, 700 F.2d 1096, 1098 n.1 (7th Cir.1983) (exhaustion raised *sua sponte*).

In *Bowen v. Tennessee*, *supra*, the en banc sixth circuit was presented with a case similar to this one, involving an appeal of exhausted claims from a mixed petition in which lack of exhaustion was waived. The panel had entertained the claims on the merits. The en banc court, following *Rose*'s command, reversed:

> Wherefore, in light on [sic] the emphasis in *Rose* upon comity as protecting "the state *courts*' role in the enforcement of federal law and prevent[ing] disruption of state *judicial* proceedings" [adding emphasis to *Rose* quote], this court concludes that the total exhaustion rule promulgated in *Rose* may not be waived or conceded in the district court by a state attorney general and may be noticed by this court *sua sponte* on appeal.

698 F.2d at 243.

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[39] *Rose* applies to pending appeals, such as this one. *Bergman v. Burton*, 456 U.S. 953, 102 S.Ct. 2026, 72 L.Ed.2d 478 (1982); *Rodriquez v. Harris*, 455 U.S. 997, 102 S.Ct. 1627, 71 L.Ed.2d 858 (1982); *Duckworth v. Cowell*, 455 U.S. 996, 102 S.Ct. 1626, 71 L.Ed.2d 858 (1982).

The sixth circuit's holding was based on *Duckworth v. Cowell*, 455 U.S. 996, 102 S.Ct. 1626, 71 L.Ed.2d 858 (1982) and *Rodriquez v. Harris*, 455 U.S. 997, 102 S.Ct. 1627, 71 L.Ed.2d 858 (1982). In both of these cases the Supreme Court encountered exhausted claims from mixed petitions which the courts of appeals decided on the merits. The Court in each case granted certiorari, cited *Rose*, vacated the judgments, and remanded to the court of appeals "with directions that it instruct the [district court] to dismiss the petition for a writ of habeas corpus." 455 U.S. at 996, 102 S.Ct. at 1626; 455 U.S. at 997, 102 S.Ct. at 1627.

In *Bergman*, the Sixth Circuit Court of Appeals entertained on the merits an exhausted claim from a mixed petition; the district court dismissed the unexhausted claim without considering it on the merits. *Burton v. Bergman*, 649 F.2d 428, 429 (6th Cir.1981). The State did not, apparently, object to either court proceeding to the merits of the exhausted claim. The court of appeals directed that the writ issue on the exhausted claim. The State petitioned the Supreme Court for certiorari, presenting in its certiorari petition only the merits of the exhausted claim. The Supreme Court granted certiorari, vacated the judgment, and demanded "for further consideration" in light of *Rose*. As Justice Stevens, dissenting, stated,

> The petition makes no reference to the unexhausted claim. Ignoring the four questions presented by the [State], the Court grants [its] petition, vacates the judgment of the Court of Appeals, and remands for consideration in the light of *Rose v. Lundy*.
>
> Under *Rose v. Lundy*—if I read the Court's opinion correctly—after the case gets back to the District Court, that Court must dismiss the habeas corpus petition that is now a part of the record.

102 S.Ct. at 2027-28 (Stevens, J., joined by Marshall and Blackmun, JJ., dissenting) (footnote omitted).

Bergman instructs us, plainly, that if we fail to notice a lack of exhaustion *sua sponte*, the Supreme Court may. By taking the step it did, the Court showed that a mixed petition with exhaustion implicitly waived requires remedial dismissal by any federal court which notices it. The en banc court should take such action today.

I realize that this seems to equate the exhaustion rule to a rule of subject matter jurisdiction. Exhaustion is not purely jurisdictional, because federal courts are granted subject matter jurisdiction to hear habeas corpus claims from state prisoners by 28 U.S.C. § 2241(c)(3) (1976). 28 U.S.C. §§ 2254(b) and (c) (1976), however, limit the relief a district court may grant to those "applications" that present only exhausted claims. *See supra* text at 1533. Sections 2254(b) and (c) also narrowly define which claims may be deemed exhausted. The Supreme Court has given this statute a literal interpretation, to give full effect to the policies Congress sought to enforce. Because no two litigants may stipulate to a district court's entertaining a habeas petition when the petition does not satisfy section 2254 and *Rose*, the exhaustion doctrine must be viewed as quasi-jurisdictional. Accordingly, we must notice the lack of exhaustion in this case and remand it to the district court with the instruction to dismiss the petition.

IV.

Realizing that to do so may detract from my argument that *Rose* mandates the dismissal of this case, I address the merits of petitioner's *Witherspoon* claim. The record shows that petitioner's trial counsel did not properly preserve for state appellate court review the specific issue the court decides today: whether the state trial judge was correct in concluding that venire members Varney and Murphy were sufficiently biased against the death penalty to be disqualified to serve as jurors. Because this issue was not preserved for appeal and thus, I submit,

not decided on the merits by the Florida Supreme Court, petitioner must show cause and prejudice under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Petitioner did make a "*Witherspoon*" objection at trial, and that objection was preserved for appellate review. It was a patently unmeritorious objection, however, and as such was rejected out of hand by the Florida Supreme Court. The *Witherspoon* objection the court recognizes and rules upon today was not made, was therefore not preserved for appeal, and was not dealt with by the Florida Supreme Court. The petitioner has admitted as much; in presenting his *Witherspoon* claim to the district court he stated that it had not been exhausted.[40] This is why *Sykes* cause and prejudice must be shown. Since petitioner has not made this showing, I would deny the writ.

The following chain of events makes my thesis clear. Before voir dire of the venire members began, the lawyers for the parties met with the trial judge in chambers to consider a defense motion in limine.[41] The following colloquy took place:

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[40] Petitioner's *Witherspoon* claim was made a part of his habeas petition on September 14, 1979. *See, e.g., supra* text at 1534. The claim first surfaced in petitioner's answers to the State's interrogatories that asked the petitioner to disclose any federal constitutional claims that he had in addition to the three claims he presented in his original and first amended habeas petitions. *Id.*, at 1534-1536. He stated that he had 23 additional claims, including the *Witherspoon* claim here in issue, and that none of these additional claims had been exhausted. App.Rec., vol. 1, ex. 20. Several of these 23 claims, including the *Witherspoon* claim, were, of course, technically exhausted, in that petitioner had failed seasonably to raise them either at trial or on appeal, and he was consequently barred from presenting them to the state courts for consideration on the merits. *See supra* note 13 and accompanying text. *Accord, Engle v. Isaac*, 456 U.S. 107, 125 n. 28, 102 S.Ct. 1558, 1570 n. 28, 71 L.Ed.2d 783 (1982).

[41] Fifty days before petitioner's case was called for trial he moved the court to foreclose both prosecution and the defense (and

THE COURT: All right. We are here to hear a motion. The State and the defendant represented by counsel, the defendant is present in person. *We are*

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presumably the court) for examining any prospective juror, during the voir dire of the venire, as to his or her views about capital punishment and to deny all challenges for cause based on such views. Petitioner's motion read as follows:

> COMES NOW the Defendant, by and through his undersigned counsel, and moves this Court for an order limiting the voir dire examination of the prospective jurors, and alleges:
>
> 1. That under the Supreme Court's ruling in *Witherspoon v. Illinois*, 389 U.S. 1035, 88 S.Ct. 793, 19 L.Ed. [sic] 822, the Supreme Court ruled that in a non-bifurcated trial, the prosecutor could be allowed to ask whether or not a juror would ever consider imposing the death penalty.
>
> 2. That subsequent to the enactment of Florida Session Law 72-724, Florida Statute 921.141 provides for two (2) deliberations by a Florida jury—one to consider guilt or innocence, and a subsequent deliberation to consider mercy or no mercy.
>
> 3. That any questions asked by a prosecutor relating to whether or not a juror would even consider capital punishment in no way relates to, is not reasonably related to nor relevant to a decision on the defendant's guilt or innocence and an answer by a juror that the juror could not consider the death penalty would not in any way affect the ability of the juror to participate fully and freely in deliberations on the questions of innocence or guilt.
>
> 4. That *to allow the prosecutor to ask Witherspoon-type questions and be granted challenges for cause on the basis that the juror could not consider the death penalty unduly prejudices the defendant's right to a fair trial*, in violation of his right to a fair and impartial jury trial and to due process in violation of the Fifth and Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida State Constitution.
>
> WHEREFORE, *the defendant requests that this Honorable Court enter an order limiting both the prosecution and the defense from asking any questions of the prospective jurors relating to their belief either for or against the death penalty and to deny any and all challenges for cause based upon Witherspoon-type questions.*

Trial Record, vol. 1, at 106-107.

to hear a motion by the defendant to limit the State Attorney of his voir dire examination, arguing the Willie Spoon [sic] case.

All right, sir, I am not inclined to grant it. I will be glad to listen to you on it.

MR. MALONEY [defense counsel]: Your Honor, I do not wish to argue very longly [sic]. *The Court held in the Willie Sppon [sic] case the prosecutor could not ask these type of questions.* In Florida we now have biforcated [sic] trial. The first part of the trial is used only to determine the question of facts, whether or not this individual committed a capital crime.

THE COURT: Yes, sir.

MR. MALONEY: I think that a *question regarding how the jury would be disposed to punishment* in the event they found a verdict of guilty *would be irrelevant and immaterial to* that trial and to their determination of the question of fact, *whether or not he did it* [i.e., commit murder]. And *all we are asking is that such questions first not be asked by either parties, and if, in fact, the Court is going to allow the questions to be asked, that a response in the negative they would not impose the death penalty not constitute a challenge for cause.*

THE COURT: No, sir, if, at the conclusion of the trial, the jury should return a verdict of guilty of murder in the first degree, which is a capital offense, the same jury would serve as the jury in the second half of the biforcated [sic] trial and there will not be a re-selection of a jury. At this time on voir dire it is necessary to ask questions of this jury including their attitude on such things and it's got to be now.

Under the Florida capital punishment law there are certain conditions set up under which the proper

penalty is the death penalty. In a prospective jury —It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause.

You made your motion and your objection and the motion will be denied. You will, of course, be allowed at the time of the voir dire examination to raise your namely [sic] objection, but would indicate the ruling at this time. *I am not cutting you off from objecting when we get to that specific question. Generally, that will be my ruling. I won't cut them off from inquiring in the general area; the specific questions they ask may be objectionable, I don't know.*

MR. MALONEY: If I raise the objection, which I would, will the Court make it a continuing objection?

THE COURT: Yes, sir.

MR. McDANIEL [State's attorney]: *Is the Court saying it is going to be a continuing objection from here on out?*

THE COURT: *Continuing objection to that particular line of questions.*

MR. McDANEL: *I take it your objection right now is continuing from here on out?*

THE COURT: *Yes, sir, to the whole general line of questions. Still I am not telling you I will deny*

your objection on some specific question for some other reason you feel it has gone too far.

MR. MALONEY: Yes, sir.

Trial Record, vol. 3, at 16-19 (emphasis added). It is clear to me that petitioner's lawyer, at the outset, mistakenly thought [42] that *Witherspoon*, applied in the context of Florida's recently enacted bifurcated trial procedure in capital cases, foreclosed any mention of the death penalty during the jury selection process.[43]

Petitioner's motion in limine asserted two alternative grounds: first, that *Witherspoon* prohibited, as "irrelevant and immaterial," *any* venire voir dire on the issue of punishment prior to the jury's determination of guilt; second, that the court could not excuse for cause any venire member who could not vote for the death penalty. The motion was timely but unmeritorious on both grounds. As to the first ground, the motion was timely because it informed the trial judge before voir dire began that any injury of a venire member, in advance of the guilt phase of the trial, concerning his or her feelings about the death penalty would be "irrelevant and immaterial" and would constitute federal constitutional error. The motion was unmeritorious because such voir dire inquiry was not only proper, but required.

As to the second ground, the motion was timely because it informed the trial judge that it would be improper and would constitute federal constitutional error for him to excuse for cause any venire member who

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[42] His mistake was understandable, perhaps, given the fact that this was the first post-*Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), capital case tried in Polk County, Florida, and counsel did not know until the morning the trial was to begin that he would be the defense attorney (petitioner had two lawyers) who would conduct the jury voir dire.

[43] Precisely when, if at all, counsel thought the jurors were to be qualified for service during the sentencing stage of the trial does not appear in the record.

indicated that he or she "would not impose the death penalty." In other words, regardless of the extent of the venire member's bias against the death penalty, an excusal for cause would be error. Had the judge agreed with petitioner's view of the law, he would have granted petitioner's motion *instanter*, since a contemporaneous objection at the time of the venire member's challenge for cause would have added nothing to petitioner's motion in limine and thus would have been unnecessary. The judge did not agree, however, and properly so, because petitioner's view of the *Witherspoon* rule was in error. *Witherspoon* does not entitle a capital defendant to jurors who "would not vote to impose the death penalty." *Witherspoon* only insulates from a challenge for cause a prospective juror who could vote for the death penalty under some circumstances.[44]

A *Witherspoon* objection must be made contemporaneously, after the prospective juror has been examined about his views on the death penalty. The objection is addressed to the juror's state of mind. In ruling on the objection, the trial judge must of course consider the questions put to the prospective juror and his responses. The judge is not restricted to these naked statements, however. The judge may also consider any evidence that bears on the venire member's bias: his demeanor, tone of voice, nonverbal communications, and comprehension of the questions asked of him and other venire members. Unless a defendant's objection is properly stated *and* contemporaneous, the judge may be deprived of the opportunity to make further inquiry of the venire member

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[44] *Witherspoon* authorizes the excusal for cause of:

> (1) a venire member who makes unmistakably clear that he would automatically vote against the imposition of capital punishment without regard to the evidence presented or (2) a venire member whose attitude toward the death penalty would prevent him from making an impartial determination as to the defendant's guilt.

See Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

and to state on the record what, if anything beyond the naked words that have been spoken, he may have considered in determining that the venire member is disqualified to serve on the jury.

After denying petitioner's motion in limine, the trial judge, recognizing the contemporaneous nature of a *Witherspoon* objection, invited counsel to make timely and specific *Witherspoon* objections during voir dire to any questions put to any individual venire member concerning his or her feelings about the death penalty. The judge also invited counsel to object to the excusal for cause of anyone demonstrating a bias against the death penalty sufficient to disqualify him or her for jury service. As the record of the ensuring voir dire indicates, counsel never made such objections. Instead, counsel merely requested the court to treat his unmeritorious pretrial motion in limine as a "continuing objection." The court granted his request.

After the court and counsel returned to the courtroom to begin the venire voir dire, petitioner's counsel, in a final effort to insulate the venire from any examination about the death penalty, renewed the motion in limine he had just argued in chambers. He said:

> Your Honor, pursuant to the motion I filed beforehand I object to this question[ing]. I believe that it is irrelevant to the matter at hand and I think that the discussion of this at this time prejudices the defendant's right to a fair and impartial trial.

Trial Record, vol. 3, at 43-44. The court denied counsel's motion, and the venire voir dire commenced.

Throughout the voir dire the trial judge's attention was obviously focused on petitioner's motion in limine as petitioner had stated it in his formal pretrial pleading, *supra* note 41, and in chambers. As the colloquy on voir dire shows, petitioner's counsel said nothing to indicate that he intended his "continuing objection" to mean anything more than what he had presented to the court prior

to trial.[45] "His continuing objection" did not grow into its present form until his final amendment to his habeas petition in the district court.

The second venire member to be examined, and the first to be excused for *Witherspoon* cause, was Mr. Varney. Venire member Varney was excused for cause after the court's *Witherspoon* inquiry. *Id.*, at 45. When the court announced that it would excuse Varney for cause, petitioner's counsel stated "I renew the objection. I do not think he should be challenged for cause." By this the lawyer meant that he renewed his motion in limine. The court replied, correctly, "Yes, sir, the objection will be noted and overruled." Moments later the court excused venire member Mays for cause, stating "Mr. Maloney, I assume you wish the same objection to apply to him." Maloney replied, "Yes, your honor," *id.*, at 46, again referring to his motion in limine. The third excusal for cause under *Witherspoon* took place following the examination of venire member Carn. After a long colloquy with her, the court excused her. *Id.*, at 107. Counsel objected, stating "Your honor, once again I object, *I don't think that is relevant*" (emphasis added), an obvious reference to the first ground of his motion in limine. The court stated, "Objection will be noted." Counsel's objection, here, shows that he continued to challenge the relevancy of the line of questioning rather than the sufficiency of the bias shown by excused venire members. The court next excused for cause venire member Maher. *Id.*, at 110. After her negative answer to the proper *Witherspoon* questions, the court said, "Very well,

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[45] We have considered in a related context the inadequacy of a motion in limine to serve the purposes of a contemporaneous objection. "[M]otions in limine are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial. . . . [A contemporaneous objection] will give the trial court an opportunity to reconsider the grounds of his motion in light of the actual—instead of hypothetical—circumstances at trial." *Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980). *See* Annot., 63 A.L.R.3d 311, 333 (1975) (citing cases).

over the objections of the defendant she will be excused." Counsel said nothing, apparently satisfied that his continuing objection was being honored.

The last venire member excused for cause under *Witherspoon* was Murphy. After Murphy was excused, *id.* at 165, counsel said nothing, and the clerk called the next venire member. The court then spoke to the court reporter, "Mrs. Horne, you will note the defendant object [sic] to him [Murphy] being excused for cause." This was nothing more than the court's acknowledgement that it had considered petitioner's motion in limine as having been renewed and denied. At no time did the defense counsel object to Murphy's excusal on the ground that Murphy had not made it unmistakably clear that he would automatically vote against the death penalty (the issue brought to the district court, and decided by us today) or that his feelings against the death penalty would impair his ability to find guilt.

By failing to state a proper contemporaneous objection, counsel denied the trial judge the opportunity to question Murphy further or to state the reasons why he concluded that Murphy was disqualified. Those reasons might have gone beyond Murphy's naked responses to the questions put to him. As I have indicated, *supra* text at 1547, the judge may have relied on Murphy's demeanor, nonverbal communications, tone of voice, his comprehension of the *Witherspoon* inquiry directed to him and other venire members, and any other evidence that may have indicated the extent of Murphy's bias.

Florida law is settled that if a capital defendant wishes to object to the exclusion of a venire member for cause he must make a timely and proper objection. *Brown v. State*, 381 So.2d 690, 693-94 (Fla.), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1980); *Paramore v. State*, 229 So.2d 855 (Fla.1969), *vacated on other grounds*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). Failure to make a timely and proper objection waives the issue. *Id.*; *see also* 33 Fla.

Jur.2d, Juries § 109 (1982); Fla.Stat.Ann. § 913.03 (1983). Because petitioner failed to object to Murphy's excusal for cause on the ground that Murphy did not unequivocally indicate that he would automatically vote against the death penalty, petitioner waived that issue. Consequently, the Florida courts would not, and apparently did not,[46] consider the issue decided here: whether Murphy was excluded for showing the type of bias justifying a *Witherspoon* excusal for cause.

In summary, petitioner has brought us an objection he did not raise in state court. Failure to follow Florida's clear, and unambiguous, contemporaneous objection rule constituted a "procedural default" under *Wainwright v. Sykes, supra.* Accordingly, petitioner must show cause for failing to object, and actual prejudice resulting from the forfeiture.[47] *See Douglas v. Wainwright*, 714 F.2d 1532, 1547 (11th Cir.1983).

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[46] Petitioner's motion in limine, based on a faulty interpretation of *Witherspoon*, is in the trial record. *See supra* note 41 and accompanying text. It, and the trial court's ruling thereon, was before the Florida Supreme Court on direct appeal. That court, in describing the claims presented to it, stated that petitioner sought reversal because of "the exclusion of prospective jurors because of their expressed attitudes toward the death penalty." 329 So.2d at 288. That is all the court had to say on the matter. Had petitioner raised the precise *Witherspoon* claims he presents here as to venire members Murphy and Varney's bias, the Florida Supreme Court would have been bound by its contemporaneous objection rule to reject those claims on procedural grounds. *See supra* note 41 and accompanying text.

[47] It is a settled rule that where a state court in a post-conviction proceeding rules on the merits of a procedurally defaulted claim, the federal court may proceed to the merits of the claim without inquiring as to the existence of cause and prejudice. *Douglas*, 714 F.2d at 1547 n. 19; *Thomas v. Blackburn*, 623 F.2d 383, 386 (5th Cir. 1980), *cert. denied*, 450 U.S. 953, 101 S.Ct. 1413, 67 L.Ed.2d 380 (1981). No state court ruled on the merits of the *Witherspoon* claims petitioner presents here. *See supra* notes 41 & 46. Accordingly, he must overcome the cause and prejudice hurdles.

"Cause and prejudice" is a conjunctive standard, both prongs of which must be satisfied by the petitioner before a court is free to ignore the procedural default and hear the merits of the petitioner's claim. *Isaac*, 456 U.S. at 134 n. 43, 102 S.Ct. at 1575 n. 43. A petitioner may not raise a procedurally defaulted claim without meeting the standard. *See United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (28 U.S.C. § 2255); *Douglas*, 714 F.2d at 1547. This petitioner has not shown cause and prejudice; *Wainwright v. Sykes* requires us to deny the writ. *Sykes*, 433 U.S. at 85, 97 S.Ct. at 2505; *Sullivan v. Wainwright*, 695 F.2d 1306 (11th Cir.1983) (procedural default on *Witherspoon*; burden to show cause and prejudice on petitioner); *see also Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (prisoner forced to wear prison garb at trial must preserve objection). *See generally* C. Wright, Federal Courts 339-43 (4th ed. 1983).

The *Sykes* opinion identified important interests advanced by requiring compliance with a state's contemporaneous objection rule as a precondition to obtaining federal habeas relief. Such a requirement "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest" and "enables the judge [such as the one in petitioner's case] who observed the demeanor of those witnesses to make the factual determination necessary for properly deciding the federal constitutional question." 433 U.S. at 88, 97 S.Ct. at 2507. *See* discussion *supra* text at 1547, 1548. Failure to enforce the contemporaneous objection rule, the Court stated, "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89, 97 S.Ct. at 2508. Further, insisting on a contemporaneous objection is desirable because it "encourages the result that [state trial] proceedings be as free

of error as possible." *Id.* at 90, 97 S.Ct. at 2508. The policy considerations expressed in *Sykes* apply fully to petitioner's case.

We should consider the *Sykes* issue even though the state did not raise it in the district court or on appeal. *Isaac* is the latest full Supreme Court exposition on state procedural default and federal habeas relief. That case presented to the Supreme Court three consolidated habeas proceedings in which the petitioners had failed to object to improper jury instructions. The constitutional issue concerning their claims was fairly novel. Even though the State never raised the procedural default issue against one of the petitioners, the Supreme Court stated that both the district court and the court of appeals had properly considered the issue. *Id.* 456 U.S. at 124 n. 26, 102 S.Ct. at 1570 n. 26. The *Isaac* Court distinguished two prior cases, neither of which bar our consideration of the issue *sua sponte*.[48] Moreover, policy considerations

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[48] The Court distinguished *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) and *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980). Although *Smith* and *Jenkins* have been cited for the proposition that a court should not entertain a procedural default *sua sponte*, *see Thompson*, 714 F.2d at 1503, neither case fully considered the issue. In *Smith*, the Court simply said:

> For the reasons stated by the Court of Appeals, we reject the State's argument that respondent waived his Fifth Amendment claim by failing to make a timely, specific objection to Dr. Grigson's testimony at trial. See 602 F.2d, at 708, n. 19. In addition, we note that the State did not present the waiver argument in its petition for certiorari. See this Court's Rule 40(1)(d)(2) (1970).

451 U.S. at 468 n. 12, 101 S.Ct. at 1876 n.12. The *Jenkins* Court limited its discussion to raising the procedural default *sua sponte* in the Supreme Court:

> The petitioner did not raise his constitutional claims during his state-court trial. Thus, the respondent argues that the rule of *Wainwright v. Sykes*, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977), bars consideration of the petitioner's habeas petition. But the respondent failed to raise the Sykes question in either

stated by *Sykes* favor our raising the issue. Petitioner sandbagged his claims and dumped them in the district court. Had he made a proper *Witherspoon* objection at trial, the putative error could have been resolved, or at least clarified. Petitioner is not entitled to the writ.

JAMES C. HILL, Circuit Judge, concurring specially:

I concur in the result announced for the court by Judge Johnson.

I concur only because, on this record, Mr. Murphy was disqualified from serving as a juror but it had not been clearly shown that he would *automatically* vote against the imposition of capital punishment regardless of the evidence. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1967). I agree with all that Judge Fay says touching upon the peculiar position occupied by a trial judge, enabling him or her best to evaluate the venireperson's responses to *Witherspoon* questions. I do not find it remarkably different from what is said

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the District Court or the Court of Appeals. Ordinarily, we will not consider a claim that was not presented to the courts below. See *Dorszynski v. United States*, 418 U.S. 424, 431, n. 7, 41 L.Ed.2d 855, 94 S.Ct. 3042 [3047, n. 7] (1974). Considerations of judicial efficiency demand that a Sykes claim be presented before a case reaches this Court. The applicability of the Sykes "cause"-and-"prejudice" test may turn on an interpretation of state law. See *Rummel v. Estelle*, 445 U.S. 263, 267, n. 7, 63 L.Ed.2d 382, 100 S.Ct. 1133 [1135 n. 7] (1980). This Court's resolution of such a state-law question would be aided significantly by the views of other federal courts that may possess greater familiarity with Michigan law. Furthermore, application of the "cause"-and-"prejudice" standard may turn on factual findings that should be made by a district court. Accordingly, we do not consider the Sykes issue in this case.

447 U.S. at 234 n. 1, 100 S.Ct. at 2127 n. 1. Application of the cause and prejudice standard in the instant case requires no fact-finding. Accordingly, *Smith* and *Jenkins* do not militate against our proceeding *sua sponte*, and *Isaac* encourages us to do so.

by Judge Johnson. Perhaps I should be inclined to show more deference to the finding of the trial judge than either. A conscientious trial judge must be bent upon determining if a prospective juror has such a mind set that he or she would refuse to vote for the death penalty regardless of the evidence in the case. That is fact-finding. "The state of a man's mind is as much a fact as the state of his digestion." *Eddington v. Fitzmaurice*, 29 Ch. 459, 483 (1885) (Bowen, L.J.).

Yet the record must contain sufficient evidence to justify a finding of fact that a venireperson was of such a mind set that he or she was, under the law, disqualified, or the finding cannot be said to be supported. In Mr. Murphy's case, there was not sufficient evidence. He was clearly shown to be a person who could not vote in favor of capital punishment without violating his principles. He was not asked (so he never said) whether or not, if the evidence were sufficiently strong and the circumstances sufficiently aggravating, he could nevertheless vote to recommend the death penalty.

Judge Fay recounts for us the painstaking and conscientious efforts of Judge Dewell to adhere to the teachings of *Witherspoon* in the voir dire proceedings.[1] It seems clear that Mr. Murphy heard and, no doubt, understood what had been asked of those who had been examined before him. One must assume that he fully expected to be asked, after he had acknowledged his principled opposition to the death penalty, whether or not he could nevertheless vote in favor of it if the evidence in the case indicated it to be appropriate under the law. For aught appearing, he may have felt compelled under his oath to say that he could. Until it appeared that he could not, he was not disqualified. Applying the teachings of *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50

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[1] Fully acknowledging the flaw Judge Johnson has detected, *see supra* note 4 and accompanying text (at 1531), it seems clear to me that Judge Dewell understood and made diligent effort to apply *Witherspoon* in these proceedings.

L.Ed.2d 339 (1976), the writ must issue, conditioned upon resentencing.

I find nothing in this record to indicate that the jury which convicted and recommended sentence for Darden was one "uncommonly willing to condemn a man to die." Judge Fay gives us a glimpse of Darden's crimes. We do not fix sentence; we merely pass upon contentions that the proceedings leading to the sentence were constitutionally flawed. *Witherspoon* and *Davis* require me to conclude that the disqualification of Mr. Murphy was such a flaw.

For this reason, I concur in the judgment.

FAY, Circuit Judge, concurring in part and dissenting in part, with whom RONEY and HENDERSON, Circuit Judges, and MORGAN, Senior Circuit Judge, join.

Over ten years ago, on September 8, 1973, Willie Darden shot Carl Turman between the eyes and killed him while robbing his wife, Helen Turman. Interrupted by a sixteen year old boy who tried to aid Carl Turman, Darden tried to kill him by shooting him in the mouth, neck and side. In addition, Darden attempted to force Helen Turman to commit an unnatural sex act upon him at gun point. Convicted and sentenced to death, Darden has exhausted his legal remedies in both the state and federal courts. By a divided and confused court, the majority now hold that the trial jury selected in January, 1974 was not asked the proper questions under *Witherspoon*.[1] I concur in that portion of the majority opinion discuss-

[1] The habeas petition in this matter was filed on May 21, 1979. The district court denied relief on May 8, 1981. Notice of appeal was filed on June 9, 1981. Our panel opinion was issued on February 14, 1983. The *en banc* court considered the case and found itself evenly divided. An appropriate order was entered on July 1, 1983. On petition for rehearing, the *en banc* court reconsidered the case and now issues this opinion.

ing the law controlling the *Witherspoon* issue but dissent from that portion dealing with the application of this legal standard.

As stated in the panel opinion:

> *Witherspoon* has been interpreted and applied in a plethora of cases. It is well settled that a state has the power to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who had made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.
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> *Adams v. Texas*, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), *quoting Witherspoon v. Illinois*, 391 U.S. at 522-23, n. 21, 88 S.Ct. at 1777 (emphasis in original).
>
> Neither *Witherspoon* nor *Adams* provides trial courts with a formula or requisite colloquy for the proper excusal of prospective jurors on *Witherspoon* grounds. Instead, the trial judge must decide whether each particular venireperson has made it 'unmistakably clear' that he or she is within one of the two prongs of *Witherspoon*. The trial judge is in the best position to evaluate the prospective juror's demeanor and answers to the questions. For this reason, trial judges are generally accorded broad discretion in evaluating juror impartiality. *See, Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *United States v. Robbins*, 500 F.2d 650, 653 (5th Cir.1974). This tenet has even greater efficacy in a situation such as the present one—a federal appellate court reviewing the decision of a federal

> district court on a § 2254 habeas corpus petition alleging constitutional error in a state trial.

699 F.2d at 1037-8.

As pointed out by the majority, application of the *Witherspoon* rule involves a mixed question of law and fact. Mixed questions of law and fact involve the application of legal principles to the historical facts. The development of the facts is in the trial court. It is the trial judge who conducts and participates in the voir dire examination. It is the trial judge who must evaluate, analyze and interpret the responses of the venirepersons. "In assessing the adequacy of a venireperson's response to *Witherspoon* questions, a reviewing court *must* grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer." *McCorquodale v. Balkcom*, 721 F.2d 1493 at 1498 (11th Cir.1983). (emphasis added) "*Witherspoon* requires a reviewing court to independently review the record to ensure that the exclusions were proper, but that review must take into account that the trial judge was in a much better position to evaluate the clarity of a juror's response." *Id.* at 1498, *citing O'Bryan v. Estelle*, 714 F.2d at 395 (5th Cir.1983) (Higginbotham, J. concurring). The discussion by Judge Higginbotham in *O'Bryan*, cited above, is an excellent analysis of the many factors involved in the standard of review for appellate courts dealing with this issue. I adopt it in full and set forth here some pertinent extractions.

> The selection of a jury in a capital case includes many judgment calls by trial judges—calls that involve the judge's intuition about the demeanor of the venireman, the appropriateness of his response, his manner, dress, and his inflection. It is a decision with the usual stuff of trial court decisionmaking, calls more dependent upon intuition, shrewdness, or courtroom savvy than abstract analogical processes. Correspondingly, one need not pause for long to summon

up myriad examples of expression whose meaning can only be determined by the inflection and manner of its expression. For example, the simple expressions 'I reckon so' and 'I could hardly do so' may or may not express doubt.

In sum, ruling upon a request to exclude a venireman inevitably involves an interpretation of what was asked and answered. The dynamic trial scene is not easily conformed to a mold judicially shaped to facilitate review or to achieve a targeted level of accuracy, perhaps because few but lawyers and judges talk and think in such a fashion, peculiarly so with the interrogation of veniremen in death cases. Indeed, there is almost a pattern in the clarity and certainty of response—progressing from hesitation and vagueness at the outset toward greater comprehension and clarity at the end. And this mental grouping ought not be a surprise. Few citizens chosen at random have so thought through the profound moral and ethical questions implicated by *Witherspoon* qualification as to do otherwise.

A trial court's decision to sustain a challenge for cause because the venireman would automatically vote against the death penalty sometimes presents questions of fact in the sense that the trial court must choose from permissible inferences. That choice is often aided by the opportunity to observe and sometimes cannot be made without that opportunity.

Id. at 393.

Appellate review of mixed questions of law and fact and questions of ultimate fact was discussed by the Supreme Court in *Swint*. The Court intimated that the two categories may involve essentially the same type of determination, of whether the legally determinative consideration is 'satisfied by subsidiary facts admitted or found by the trier of fact.' 102 S.Ct. at 1788-89 n. 16. Cases similar to *Witherspoon*,

> involving exclusions of veniremen for bias resulting from pre-trial publicity, traditionally have been characterized as involving a mixed question of law and fact. *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); *Reynolds v. United States*, 98 U.S. 145, 156, 25 L.Ed. 244 (1878). For that reason in these cases there is on appeal an independent evaluation of the voir dire testimony. *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1642; *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir.1975); *Wansley v. Slayton*, 487 F.2d 90, 98 (4th Cir.1973), *cert. denied*, 416 U.S. 994, 94 S.Ct. 2408, 40 L.Ed.2d 773 (1974). Yet, citing *Irvin v. Dowd*, we held in *United States v. Robbins*, 500 F.2d 650 (5th Cir.1974), that 'rulings on suggestions of impartiality of the jury is within the discretion of the trial judge, and an abuse of that discretion must be clear.' *Id.* at 653. *See also Dennis v. United States*, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed.2d 734 (1950). This combination of independent review and deference to the trial judge was evident in *United States v. Taylor*, 554 F.2d 200 (5th Cir.1977). We noted there that the trial judge had discretion to decide whether to excuse a juror but nonetheless reversed his decision not to do so. Though we did not expressly characterize our review as 'independent', we reexamined the colloquy between the judge and juror, noted that '[i]t was apparent to the judge that [the juror] was extremely reluctant to sit on this jury,' and concluded that '[t]he right to an impartial jury, free of fear, dominated all other considerations.' These cases establish that reviewing courts can engage in an independent review and simultaneously give weight to trial court decisions.

Id. at 394.

In summation, Judge Higginbotham concludes:

> An extreme standard of proof coupled with a standard of decision calling for an extreme level of stated partiality requires reviewing courts to freshly make the *Witherspoon* decision. At the same time, both the standard of proof and nature of the venire decision itself counsel against a total ban of deference to such trial court decisions. All considered, I am persuaded that independent appellate review by a standard of abuse of discretion responds to the concerns of *Witherspoon* while expressing the values of comity and of respect for trial court integrity with its sometime superior opportunity for accurate decisionmaking. Independent review is an understandable expression of appellate courts' reluctance to tie their hands in advance when the stakes are so high. Here an abuse of discretion standard will allow reviewing courts freedom to correct asserted *Witherspoon* error without dilution of its demanding standard while giving weight to the trial court's decision as warranted by the circumstances of the particular case.

Id. at 396.

My disagreement with the majority holding is in the application of our yardstick to the record of this case. The majority opinion has extracted the question put to Mr. Murphy after he was called into the jury box but ignores all that went on in the courtroom before that moment. Most respectfully, I suggest this is not the correct approach. Trial juries are selected in a variety of ways but none are a mystery. This particular jury was selected in a very routine fashion. All of the prospective jurors were seated in the courtroom. Preliminary remarks and instructions were given. A series of questions was propounded to the group and then to individuals seated in the jury box. All in the courtroom participated and were in a position to hear the proceedings. As usual, the questioning was more detailed and more

personal when directed to those first placed in the box. Of necessity many of the questions were repeated many times, particularly the questions going to the *Witherspoon* issue. As the proceedings progressed the judge and counsel would refer to questions asked earlier rather than to repeat each again and again. The following extracts illustrate what transpired before Judge John H. Dewell on January 15, 1974, in the County courthouse, Inverness, Florida.

The trial judge explained to the jury their role in a bifurcated capital trial:

> THE COURT: Now the first count, first degree murder, charges what is under the present law a capital offense. You may be aware that some time ago the capital punishment law of Florida was declared invalid by the Courts, by the U.S. Supreme Court. Since then the legislature has passed a new capital punishment law in Florida that is, and that law is in effect here today. Now under the new law in the event of a capital crime, such as we have here today, we have what is known as a bifurcated trial. That is a trial will be conducted in two parts.
>
> In the first part the jury will hear the evidence in the case and will determine the guilt or the innocence of the defendant without regard to punishment at all, just determine the guilt or innocence of the charge. In the event the jury should return a verdict of not guilty or guilty of some lesser included offense less than a capital crime, of course, then that is the end of the trial. In the event that the jury should come back with a verdict of guilty of first degree murder, which is the capital offense then would be held by the same jury the second part of the bifurcated trial.
>
> During the second part of the trial the jury would then be allowed to hear additional testimony concerning facts that were not admissible in considera-

tion of the guilt or innocence. Matters of age or other factors listed in the Statute are mitigating or aggravating factors which could be considered. The jury would then, by a majority vote—now a vote of guilt or innocence must be a unanimous verdict, everyone must agree—but on your second verdict which is known as an advisory sentence the jury by a majority vote would recommend to me as a Court what the proper sentence should be. If they find that the aggravating circumstances are sufficient and they are not outweighed by mitigating circumstances then the proper recommendation would be that the death penalty be imposed. If they find that the mitigating circumstances outweigh any aggravating circumstances, then the recommendation, the verdict should be the advisory sentence should be for life imprisonment.

In either event the final decision is not the jury's. The final decision is rested solely with the Court. It will be my decision in the event of a verdict of guilty of first degree murder it will be my decision to whether or not, my determination alone, as to whether or not this defendant should go to the electric chair. I do want you to understand though that the law intends and I certainly would give great weight to what the advisory sentence would be. So you should not take your duties lightly. However, I would not be obligated to follow it. The jury might return a recommendation, advisory sentence of the death penalty and I might reduce it to life imprisonment and the jury might recommend life imprisonment and I would feel that they were wrong and sufficiently strongly to go ahead and administer the death penalty anyway. Both have been done in this state under the law, the new law.

Now that is a procedural situation, that is where we stand. I will tell you further in the event of life imprisonment on a capital crime the law provides

that the defendant shall serve not less than twenty-five calendar years before he becomes eligible for parole which is contrary to the usual life sentence in any other life sentence the ordinary parole laws would apply.

Now do y'all understand the procedure in a bifurcated trial?

State Transcript Ex. Vol. III at 25-28.

At this time I want to get off into a different area concerning the capital punishment feature of the case. I have explained to you already the basic procedure. How we have a two section trial and how although the final determination in the event of a verdict of guilty of first degree murder the final determination as to penalty will be mine. But that you, if you are selected on the jury, would be called upon to listen to further testimony and to advise me by advisory sentence.

Now at the time of the submission of the case, should that time ever arrive, you will be instructed by me on the law as to what matters you should consider and what you should not consider and how you should go about in arriving at your advisory sentence. Under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating [sic] then it would be proper under the law your correct verdict would be to recommend the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require

that recommendation? Do you understand my question?

MR. MALONEY: Your Honor, pursuant to the motion I filed beforehand I object to this question. I believe that it is irrelevant to the matter at hand and I think that the discussion of this at this time prejudices the defendant's right to a fair and impartial trial.

THE COURT: All right, sir. Motion will be denied and the objection overruled.

All right, Mrs. Macy do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?

MRS. MACY: No, sir.

THE COURT: Do you, Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pellellat?

MR. PELLELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No, sir.

MR. VARNEY: Yes, sir.

THE COURT: You fell then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would.

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service.

CLERK: Number 114.

THE COURT: Mrs. Hann, do you hold such strong beliefs that you would be unwilling under any event to return a death sentence?

MRS. HANN: No, sir.

THE COURT: Mr. Waller?

MR. WALLER: No, sir.

THE COURT: Mr. DeMilt?

MR. DeMILT: No, sir.

THE COURT: Mr. Dorminy?

MR. DORMINY: No, sir.

THE COURT: Mrs. Keck?

MRS. KECK: No, sir.

THE COURT: Mr. Roberts?

MR. ROBERTS: No, sir.

THE COURT: Mr. Mays?

MR. MAYS: Yes. I could not recommend it.

THE COURT: All right.

You will be excused, Mr. Mays. Mr. Maloney, I assume you wish the same objection to apply to him.

MR. MALONEY: Yes, Your Honor.

THE COURT: So recorded.

(Mr. Mays was excused from the jury box).

Id. at 42-46.

The two prospective jurors that were added to replace those excused were then examined.

THE COURT: Do either of you hold such strong moral or religious conscientious principles in opposi-

tion to the imposition of the death penalty that you would be unwilling to recommend the imposition of the death penalty regardless of the evidence?

MR. PURCELL: No.

MRS. O'BRY: No.

Id. at 49.

Mr. McDaniel, assistant state attorney, conducted his examination of the prospective jurors.

Mrs. Keck, did you hear the indictment read, the charges against the defendant?

MRS. KECK: Yes, sir.

MR. McDANIEL: Merely hearing the indictment understanding he is charged with a capital offense and then robbery and then I believe assault with intent to commit first degree murder are these such horrible crimes that you would rather not sit? Are sitting there—I might be if I were in your position —saying 'Please don't make me stay. Let me go'? Are you in that position?

MRS. KECK: I don't believe so.

MR. McDANIEL: Mr. Roberts?

MR. ROBERTS: Yes, sir.

MR. McDANIEL: You feel the same way, you don't mind serving on this type of jury?

MR. ROBERTS: No, sir.

MR. McDANIEL: Mr. Purcell, other than your job?

MR. PURCELL: No, I don't mind.

MR. McDANIEL: Mrs. O'Bry?

MRS. O'BRY: No.

MR. McDANIEL: Mrs. Spike?

MRS. SPIKE: No.

MR. McDANIEL: I know I am pronouncing your name wrong.

MR. PELLELLAT: Pellellat.

MR. McDANIEL: You understand what the man is charged with?

MR. PELLELLAT: Yes.

MR. McDANIEL: And you have no objection to sitting on this type of jury?

MR. PELLELLAT: No.

MR. McDANIEL: And Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

MR. McDANIEL: Mrs. Macy?

MRS. MACY: No.

MR. McDANIEL: Mr. Waller?

MR. WALLER: No.

MR. McDANIEL: Mr. DeMilt?

MR. DeMILT: No.

MR. McDANIEL: Mr. Dorminy?

MR. DORMINY: No, sir.

Id. at 52-54.

After Mrs. O'Bry, Mr. Waller, and Mr. DeMilt were peremptorily excused three additional prospective jurors were questioned.

THE COURT: Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to recommend

the death penalty regardless of what the evidence was?

MR. CARHUFF: No, sir.

MR. SCHNEIDER; No, sir.

MRS. LUCKER: No, sir.

THE COURT: Do any of you know of any reason good, bad or indifferent whatsoever whether it is a reason or just an excuse why you feel it might be difficult for you to sit here and be fair and impartial in a trial of this case?

MR. CARHUFF: No, sir.

MR. SCHNEIDER: No, sir.

MRS. LUCKER: No, sir.

THE COURT: You feel that you can and you would return a verdict based upon the evidence and the law which would be fair to both State and to the defendant?

MR. CARHUFF: Yes, sir.

MR. SCHNEIDER: Yes, sir.

MRS. LUCKER: Yes, sir.

Id. at 88-89.

Mr. White, another assistant state attorney also examined the prospective jurors.

The Judge will instruct you that when you retire to the jury room to consider your verdict you have basically two things that you can look to; the law that this Court gives you and the evidence that comes from that chair right there. Now in everybody's mind in this courtroom today, and I am sure in yours, is the fact that this is a capital crime. Nevertheless would you hold true to your oath as jurors and consider two things in that jury room:

the law that this Court gives you and the evidence that comes from that chair and nothing else? Would each of you do that?

Would each of you realize that just because this is a very serious crime, a capital case, the State has no higher burden of proof than it has on any other criminal case?

Id. at 92.

Mr. Roberts, Mrs. Spike, Mr. Purcell and Mrs. Keck were peremptorily excused. After a recess for lunch, the questioning continued for jurors who replaced those excused.

THE COURT: Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?

MS. CARN: I don't think that I would; but I do not believe in capital punishment.

THE COURT: The question isn't ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you to vote to return a recommendation of the death penalty regardless of what the evidence might be.

MS. CARN: That's right.

THE COURT: All right, ma'am. Then we will excuse you right now. I appreciate your candor.

MR. MALONEY: Your Honor, once again I object. I don't think that is relevant.

THE COURT: Objection will be noted.

(Ms. Carn was excused from the jury box.)

Id. at 106-07.

BY THE COURT: I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence of the facts might be?

Would you Ms. Pigeon?

MS. PIGEON: Yes, sir.

THE COURT: Mr. Wall?

MR. WALL: No, sir.

THE COURT: How about you, Ms. Maher?

MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

THE COURT: And no matter what the evidence showed you don't think you would vote for it?

MS. MAHER: I couldn't, sir.

THE COURT: Very well, over the objection of the defendant she will be excused.

(Ms. Maher was excused from the jury box.)

THE COURT: How about you, Mr. Parker?

MR. PARKER; No.

CLERK: Henry M. Embach. Number 34.

(Mr. Embach, was seated in the jury box.)

Id. at 109-10.

THE COURT: All right. Mr. Embach, do you have such strong religious or moral or conscientious

principles in opposition to the death penalty that no matter what the evidence is you would not be willing to vote to return such a verdict?

MR. EMBACH: No, sir.

THE COURT: Recommending it.

MR. EMBACH: No, sir.

THE COURT: Fine, sir.

Now are any of the four of you new prospective jurors, are you conscious of any reason whatsoever why you could not sit as fair and impartial jurors in this case?

Do you know of anything at all in your background?

All right, Mr. State Attorney, you may inquire.

MR. McDANIEL: Thank you, sir.

How many of you jurors work for Florida Power?

I guess some of the ones that are gone must have worked for Florida Power.

Mr. Wall and Mr. Embach, Mr. Parker and Ms. Pigeon, did all of you hear the questions that were asked this morning by both myself, by Mr. Goodwill, by Mr. Maloney, Mr. White and by Mr. Kovach?

Would any of your answers be substantially different than those answers given by the members now present on the jury?

Any of the questions that I asked or anyone else asked raises any question in your mind.

You heard the explanation of presumption of innocence by Mr. Goodwill and Mr. Maloney, and, of course, the Court. Each of you heard that explanation.

Can you assure me at this time you can look at the defendant and say to yourself that he is innocent, "I will presume him innocent and require me and

Mr. White to prove to you by the evidence from this stand that he is guilty beyond a reasonable doubt?

Id. at 112-13.

Mr. Blankenship was peremptorily removed and was replaced by Daniel Lord.

THE COURT: Are you conscious of any reason why you could not sit in this case as a fair and impartial juror?

MR. LORD: No, sir.

THE COURT: Do you have such strong religious or moral or conscientious principles in opposition to the death penalty that you would be unwilling to recommend, no matter what the facts were, you would be unwilling to recommend the death penalty to the Court?

MR. LORD: No.

THE COURT: All right, Mr. McDaniel, it is your turn.

MR. McDANIEL: Thank you, Your Honor.

Mr. Lord, I think I have approximately one question.

At any time today has there been any question asked by me to any of the jurors, prospective jurors that you think that your answers would have been different that what I wanted, what was responded to by the other jurors?

MR. LORD: No.

MR. McDANIEL: OK.

Id. at 131-32.

Mrs. Pigeon was peremptorily excused and was replaced by Jack Dwayne Hudson.

THE COURT: Do you have such strong principles in opposition to the death penalty under no factual

situation would you be willing to vote to recommend to the Court the imposition of the death penalty?

MR. HUDSON: No.

THE COURT: You heard me this morning explain to all of the jurors the principle of presumption of innocence as applies to this defendant and the requirement his guilt be proved beyond a reasonable doubt before you could convict?

Do you feel that you will be able to accord him these rights?

MR. HUDSON: Yes, sir.

THE COURT: Will you do that, sir?

MR. HUDSON: Yes, sir.

THE COURT: Do you know of any reason why you could not sit in this case as a fair and impartial juror and return a verdict favorable both to the State and to the defendant?

MR. HUDSON: No, sir.

THE COURT: All right, Mr. White.

Id. at 140-41.

Mr. Lord was excused and replaced by Mrs. Helen Mays.

THE COURT: Mrs. Mays, you heard all of the questions today and I imagine you know all of the questions and answers by heard [sic] by now, but I will try you out on your memory.

Are you acquainted with the defendant over here?

MRS. MAYS: No, sir.

THE COURT: Willie Jasper Darden. Have you heard of him or this case before?

MRS. MAYS: No, sir.

THE COURT: Do you know any lawyers involved or any witnesses?

MRS. MAYS: No, sir.

THE COURT: Do you have any religious, moral or conscientious principles against the death penalty that are so strong that you would be unwilling to vote to recommend the death penalty regardless of what the facts might be?

MRS. MAYS: No, sir.

Id. at 150-51.

THE COURT: Mrs. Mays, do you know anything about this case at all?

MRS. MAYS: No, sir, I don't.

THE COURT: I have been through that. Have I asked you if you have any conscientious beliefs against the death penalty?

MRS. MAYS: No.

THE COURT: Do you know of any reason why you couldn't sit as a fair and impartial juror in this case today?

MRS. MAYS: No.

Id. at 157.

Mrs. Mays was peremptorily excused and was replaced by Ronald T. Staha.

THE COURT: Do you have any opinions or principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of a death sentence regardless of what the facts might be?

MR. STAHA: No, sir.

Id. at 160.

Mr. Staha was excused and was replaced by Theodore T. Murphy.

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

CLERK: Cecelia Clark Mulroy. Number 85.

THE COURT: Mrs. Horne you will note the defendant object [sic] to him being excused for cause.

(Mrs. Mulroy was seated in the jury box.)

THE COURT: Mrs. Mulroy, would your answers to the questions that I have been asking the other jurors would be the same as theirs?

MRS. MULROY: Yes, sir.

THE COURT: You know nothing about the case; you don't know the defendant or none of the lawyers.

MRS. MULROY: No.

THE COURT: None of the witnesses.

MRS. MULROY: No, I don't.

THE COURT: If the facts justify it would you have no such principles in opposition to the death penalty that you would be unwilling to vote to recommend the death penalty?

MRS. MULROY: Depending on the evidence.

THE COURT: Yes, ma'am.

Id. at 165-66.

A jury of twelve was accepted and sworn and alternate jurors were questioned.

In my opinion the excusal of Mr. Murphy is supported by this record. The trial judge concluded that Mr. Murphy could not follow the law and would not vote for any verdict that might result in the death sentence regardless of the evidence presented or the facts found. Mr. Murphy had worked "thirty years with the utilities." After this career it appears he worked in the administrative office of the St. Pios Seminary, Uniondale, New York. It would not be unreasonable to draw certain conclusions from these facts above. Mr. Murphy's response to the *Witherspoon* question is unequivocal. Only the trial judge could evaluate its forcefulness or the manner in which it was made. Mr. Murphy had heard the same, or similar, question many times that day. He probably knew it was coming and had thought about it long before being seated in the jury box. To suggest that the trial court's ruling was based upon one question and one answer is to ignore reality (and the record of the state court proceedings).

Applying any standard [2] to the ruling in question leads me to the conclusion that Mr. Murphy was properly excused for cause. Most respectfully, I dissent.

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[2] If "abuse of discretion" is applied as the standard, there is none; if "a close study of the voir dire transcript to determine whether a venireperson was improperly excluded from the jury" is the standard, the majority has in my opinion failed to study this record closely enough; and if "an independent appellate review" means that the court of appeals is going to determine the state of mind of the venireperson involved, we are simply wrong.

SUPREME COURT OF THE UNITED STATES

No. 83-6655

WILLIE JASPER DARDEN, PETITIONER

v.

LOUIE L. WAINWRIGHT,
Secretary, Florida Department of Corrections

ORDER DENYING CERTIORARI
(CROSS PETITION)

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

June 4, 1984. Denied.

SUPREME COURT OF THE UNITED STATES

No. 83-1613

LOUIE L. WAINWRIGHT,
Secretary, Florida Department of Corrections, PETITIONER

v.

WILLIE JASPER DARDEN

ORDER REMANDING STATE'S PETITION

Feb. 19, 1985. On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Wainwright v. Witt*, 469 U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d —— (1985).

Justice POWELL took no part in the consideration or decision of this motion and this case.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,
PETITIONER-APPELLANT, CROSS-RESPONDENT

v.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections, State of Florida,
RESPONDENT-APPELLEE, CROSS PETITIONER

July 23, 1985

Appeals from the United States District Court
for the Middle District of Florida

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON, and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C.A. § 46(c).

PER CURIAM:

Willie Jasper Darden was convicted of murder and sentenced to death in Florida. After exhausting his direct and collateral appeals in state court, he sought federal habeas corpus relief. The district court denied his petition. A panel of this court, considering and rejecting three constitutional claims, affirmed that denial with one judge dissenting. *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir.1983). Upon rehearing en banc, this court reversed, holding that the trial court's exclusion of one of the venirepersons from jury service was unconstitutional under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *Darden v. Wainwright*, 725 F.2d 1526 (11th Cir.1984) (en banc).

On February 19, 1985, the Supreme Court vacated this court's en banc decision and remanded the case for further consideration in light of *Wainwright v. Witt*, 469 U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Having undertaken such a review under the standards announced in *Witt*, we conclude that *Witt* controls the junior exclusion issue in this case. Under the *Witt* standards, Darden is not entitled to habeas corpus relief. Accordingly, we affirm the district court's denial of Darden's habeas corpus petition, and we reinstate the panel opinion, 699 F.2d 1031, as to all issues, except the juror exclusion issue.

The dissent maintains that the facts of *Witt* are distinguishable and concludes that the state trial judge's decision to exclude juror Murphy in this case violates the standards announced in *Witt*. The dissent would hold that the trial judge applied an erroneous legal standard. We disagree. In his question to juror Murphy, the trial judge asked: "Do you have any moral or . . . religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" The legal standard articulated in *Witt* provides that a prospective juror may be excluded if the

trial court is left with the definite impression that the juror's views would prevent or substantially impair the performance of the juror's duties in accordance with the instructions and oath. Although the dissenting judges in this case properly point out that a juror with strong conscientious objections to the death penalty might well be able to lay aside those objections and follow the law, it is nevertheless true that the difficulties such a juror would experience in doing so might well rise to the level of a "substantial impairment" of his performance as a juror. Thus, although the question posed to juror Murphy may not have been ideal, we cannot conclude that it was inconsistent with the "substantial impairment" test articulated in *Witt*. Moreover, as the dissent readily acknowledges, the trial judge did articulate an unquestionably correct legal standard on many other occasions during the voir dire. Thus, we must conclude, as did the Supreme Court in *Witt*, 469 U.S. at ——, 105 S.Ct. at 855-857, 83 L.Ed.2d at 856-57, that the state trial judge applied the correct legal standard.

Having concluded that the trial judge employed the correct legal standard, the voir dire record with respect to juror Murphy provides fair support for the trial judge's decision to exclude Murphy. In *Witt*, the Supreme Court held that there was fair support in the record to support the trial judge's decision to exclude juror Colby. The voir dire record with respect to Colby established merely that Colby thought that her personal beliefs would interfere with her sitting as a juror.

In this case, the voir dire record with respect to juror Murphy establishes that juror Murphy had moral or religious principles in opposition to the death penalty so strong that he would be unable to vote for the death penalty regardless of the facts without violating his principles. The dissent correctly points out that the record does not establish whether or not Murphy would have been able to lay aside his principles and follow the law. However, the voir dire record with respect to juror Colby

in *Witt* contained the same flaw, i.e., the record was silent as to whether juror Colby could have laid aside her personal beliefs and followed the law. The record established merely that juror Colby's beliefs would interfere with her sitting as a juror. The Supreme Court in *Witt* held that that provided a sufficient factual basis for the trial judge's decision to exclude juror Colby. We cannot conclude that there is less factual support in this case. In other words, principles so strong that a juror would be unable without violating his principles to vote for the death penalty is at least as strong a factual basis for an exclusion decision as principles that would interfere with one's sitting as a juror.

The Supreme Court in *Witt* also relied upon two additional factors, the trial judge's opportunity to observe the juror's demeanor, and the lack of objection by defense counsel. Noting that defense counsel did not object to the exclusion of juror Colby, the Supreme Court suggested that no one in the courtroom questioned the fact that juror Colby's beliefs prevented her from sitting, and that, although not disclosed clearly on the record, it may have been readily apparent to those in the courtroom that she was properly disqualified. Similarly, in this case, the trial judge had the same opportunity to observe juror Murphy's demeanor, and Darden's trial counsel did not object to the exclusion of juror Murphy.

Thus, we conclude that *Wainwright v. Witt* compels the holding in this case that the voir dire record with respect to juror Murphy does constitute fair support for the trial judge's decision to exclude the juror.

AFFIRMED.

TJOFLAT, Circuit Judge, specially concurring:

I agree with the court's decision to affirm the district court's denial of habeas corpus relief, though for different reasons. As I wrote in dissenting to our previous

en banc disposition, *Darden v. Wainwright*, 725 F.2d 1526, 1533 (1984), the district court should have dismissed the habeas petition in this case because it contained several unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 1203-05, 71 L.Ed.2d 379 (1982); *Galtieri v. Wainwright*, 582 F.2d 348, 354 (5th Cir. 1978) (en banc). As for the merits of petitioner's *Witherspoon* claim, assuming it to be properly before the court, I would reject the claim for want of a showing by petitioner of "cause" and "prejudice" under *Wainwright v. Sykes*, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508-09, 53 L.Ed.2d 594 (1977), since petitioner denied the Florida Supreme Court an opportunity to pass on it in reviewing his conviction and death sentence on appeal. *Darden v. Wainwright*, 725 F.2d at 1544-51 (Tjoflat, J., dissenting). Were I to consider four square the precise *Witherspoon* claim petitioner now presents to us, I would agree with the court that *Wainwright v. Witt*, —— U.S. ——, 105 S.Ct. 844 (1985), requires us to hold that the state trial judge did not violate the Constitution in excusing venireman Murphy for cause.

JAMES C. HILL, Circuit Judge, specially concurring:

I concur in the majority opinion.

My brother Clark finds my pre-*Witt* [1] observations to have been well taken. As a statement of what I perceived the law to have been when I wrote passages, I do not unsay a word. I am, now, however, further instructed.

Witt is a major correction addressed to those of us who have accepted footnote 21 of *Witherspoon* [2] as com-

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[1] *Wainwright v. Witt*, —— U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

[2] *Witherspoon v. Illinois*, 391 U.S. 510, 522-23, 88 S.Ct. 1770, 1776-1778, 20 L.Ed.2d 776 (1968).

mand. Having consisted of dicta, then, it is held to be, now. *Witt*, 105 S.Ct. at 851. While we have lost our touchstone, to which I repaired, we are re-directed to the traditional test. Is the juror fair and impartial? *See Witherspoon*, 391 U.S. at 532-40 (Black, J., dissenting).

The remnant of *Witherspoon* seems to be this. A juror is no more disqualified because he or she is opposed to the death penalty than is one in favor of it. All are qualified, on this issue, who can apply the law—including mitigation, aggravation, and other elements of capital punishment—without bias in the case to be tried. "To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a venireman to sit despite the fact that he will be unable to view the case impartially." *Witt*, 105 S.Ct. at 851.

Whether released from or cast adrift from the criterion of footnote 21, I have no difficulty in concluding, as did the trial judge, that accepting venireman Murphy would have qualified one as a juror who was not impartial. *Id.* at 853-55.

JOHNSON, Circuit Judge, dissenting:

The court holds that under the standards announced in *Wainwright v. Witt*, —— U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) Willie Jasper Darden is not entitled to habeas corpus relief. Because *Witt* maintains constitutional limitations on the power of the State to exclude jurors opposed to capital punishment, limits that have been transgressed in this case, I respectfully dissent.

I. THE EXCLUSION

Willie Jasper Darden's trial for murder, robbery, and attempted murder began in Florida state court on January 15, 1974, at 9:00 a.m. After all prospective jurors

had been placed under oath, the trial court heard a motion in chambers. Darden's attorney moved to limit the voir dire examination of the State Attorney in order to foreclose any questioning regarding the venirepersons' views about capital punishment. In the course of denying this motion, the trial judge explained the conditions which would lead him to disqualify a juror for cause:

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it *or if he did follow it, it would be going against his principles*, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause. (Emphasis supplied.)

The court reconvened after the hearing in chambers and the prospective jurors were brought into the courtroom. After a reading of the indictment and a general explanation of capital sentencing procedures in Florida and the presumption of innocence, the court told the prospective jurors that twelve venirepersons would be called to sit in the jury box, at which time the court would "inquire of you [twelve] concerning your qualifications to serve on this particular case."

Twelve jurors were seated in the jury box. After some preliminary questions regarding the twelve jurors' knowledge of the case and their occupations, the court made the following statement:

> Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to re-

> turn an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation?

The court proceeded to ask each of the twelve venirepersons a question similar to the one just described and excused two prospective jurors on the basis of their responses. Two more prospective jurors were seated and asked similar questions. The attorneys then questioned the twelve venirepersons as a group and individually before exercising several peremptory challenges. The process continued through the morning and resumed after lunch recess.[1]

At one point in the afternoon, venireperson Theodore Murphy was seated. After inquiring Mr. Murphy's occupation, the court asked him the following question: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable *without violating your own principles* to vote to recommend a death penalty regardless of the facts?" (emphasis supplied). Murphy replied "Yes" and was immediately excused.

The State Attorney and Darden's attorney ultimately accepted a panel of twelve jurors. During the selection of alternatives, the court asked venireperson Adkins a question similar to the one asked of Murphy: "Do you

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[1] During the early afternoon, venireperson Mays was seated. The court asked her whether she had any religious, moral or conscientious principles against the death penalty so strong that they would make her unwilling to recommend the death penalty regardless of the evidence. Several moments later, the court asked, "Have I asked if you have any conscientious beliefs against the death penalty?" She replied positively and after several more questions from the attorneys, venireperson Staha was seated. The court asked Staha the following question: "Do you have any opinions or principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of a death sentence regardless of what the facts might be." Venireperson Murphy was seated immediately after Staha.

hold such strong principles in opposition of the death penalty that you would be unable without violating them to recommend them, [sic] recommend a death penalty to the Court?" Adkins replied that he held no such principles and later was accepted as an alternate.

II. THE *WAINWRIGHT V. WITT* DECISION

The Constitution gives criminal defendants the right to an impartial jury. Consequently, it limits the power of the State to exclude persons from a jury in the trial of a capital crime; the State may not exclude prospective jurors simply because they oppose capital punishment. This limitation prevents the selection of a jury "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521, 88 S.Ct. 1770, 1776, 20 L.Ed.2d 776 (1968). Supreme Court and lower court precedent has until recently enforced this limitation through the use of a stringent standard of proof: jurors could not be excluded based on beliefs about capital punishment unless they made it "unmistakably clear that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon v. Illinois*, 391 U.S. 510, 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (1968). *See also Maxwell v. Bishop*, 398 U.S. 262, 265, 90 S.Ct. 1578, 1580, 26 L.Ed.2d 221 (1970); *Boulden v. Holman*, 394 U.S. 478, 482 (1969); *Darden v. Wainwright*, 725 F.2d 1526 (11th Cir.1984) (en banc), *vacated*, —— U.S. ——, 105 S.Ct. 1158, 84 L.Ed.2d 311 (1985).

The Supreme Court's opinion in *Wainwright v. Witt*, 105 S.Ct. 844 (1985), does not denigrate the importance of an impartial jury. It maintains the limitations on the power of the State to exclude jurors opposed to capital

punishment. The primary responsibility of a trial court, whether under *Witherspoon* or *Witt*, is to distinguish between "prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Id.* at 850-51.

Witt does, however, modify and "clarify" the method a trial court should use in making this difficult determination of juror impartiality. Excludable jurors no longer have to indicate an "automatic" refusal to vote for the death penalty, nor must they indicate bias with "unmistakable clarity." The "simplified" standard requires that a prospective juror leave the trial court with the definite impression that his or her views would "prevent or substantially impair the performance" of jury duties in accordance with the instruction and oath. *Id.* at 850-51.

The *Witt* decision also affects the relevant appellate standard of review. The trial court's finding of juror bias is now subject to the "presumption of correctness" contained in 28 U.S.C.A. § 2254(d) (West 1977), because the predominant function of a trial court in determining juror bias "involves credibility findings whose basis cannot be easily discerned from an appellate record." *Id.* at 855. *See Patton v. Yount*, —— U.S. ——, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Nevertheless, an appellate court must still review a finding of juror bias based on capital punishment beliefs in order to determine whether an exception to Section 2254(d) applies.[2] There are two exceptions relevant to this case.

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[2] Appellate review may also serve other functions in cases of this sort, such as a determination of the precise factual finding made by the state court or an inquiry as to whether the presumption of correctness has been overcome by convincing evidence.

III. FINDING NOT FAIRLY SUPPORTED BY THE RECORD

The state trial court in this case found that venireperson Murphy could not properly carry out his duties as a juror and excused him for cause. This factual determination, made after a hearing on the merits and evidenced by the written transcript of the voir dire proceedings, *see Witt*, 105 S.Ct. at 855-56, deserves a presumption of correctness unless Darden shows the applicability of one of the enumerated reasons for avoiding the presumption.

The presumption of correctness described in Section 2254(d) does not apply where an appellate court considering the record as a whole concludes that the record does not fairly support the factual determination of the state court. 28 U.S.C.A. § 2254(d)(8) (West 1977). The *Witt* decision indicates one possible basis for invoking that exception in this case: a petitioner may show that the record does not fairly support a factual finding of bias based on capital punishment beliefs by demonstrating that the trial court did not apply the correct legal standard in determining whether to exclude venirepersons.

The petitioner in *Witt* contended that the record did not fairly support the trial court's finding of juror bias because the excluded juror, Colby, was the first one questioned and the record did not reveal whether the trial court applied the proper legal standard in excluding Colby. The Supreme Court rejected this argument because "where the record does not indicate the standard applied by a state trial judge, he is presumed to have applied the correct one" and because in Witt's case there was "every indication that the judge applied the correct standard." *Witt*, 105 S.Ct. at 856. Although the judge did not reveal the standard used to evaluate Colby's responses, on subsequent occasions during *voir dire* he asked jurors questions "entirely consistent" with the proper

legal standard. There was no indication that the judge used different standards during the course of *voir dire*.

The Supreme Court implied throughout this discussion that if the record indicates the trial court evaluated a venireperson's qualifications under a legal standard inconsistent with the one set forth in *Witt* and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), a finding of disqualifying bias would not be fairly supported by the record. Indeed, no other conclusion is possible. A factual finding made under the wrong legal standard lacks support because, even if a trial court correctly observes a juror's demeanor or correctly interprets the contextual meaning of different questions and answers, the court must ultimately evaluate these facts under a legal standard before making the final determination of juror disqualification. Even a judge with the best possible understanding of a juror's beliefs cannot reliably decide whether that juror is disqualified to serve if the judge does not understand the type of beliefs that could lead to disqualification. The choice of a legal standard governing jury impartiality is a separate question from whether any given juror meets the standard. *Patton v. Yount*, ——U.S. ——, ——-—— n. 12, 104 S.Ct. 2885, 2891-2893 n. 12, 81 L.Ed.2d 847, 858-59 n. 12 (1984). An erroneous answer to the first question inevitably undermines the resolution of the second one. *Cf. Bose Corp. v. Consumers Union, Inc.*, —— U.S. ——, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (clearly erroneous standard inapplicable where lower court predicated its findings of fact on misunderstanding of governing rule of law).

The trial court in this case used an improper legal standard to determine whether Murphy and other venirepersons held beliefs about capital punishment that disqualified them to serve as jurors. The judge stated on the record that he intended to disqualify any prospective juror who showed that "he would be unwilling to follow the law [as instructed by the court] *or* if he did follow it, it would be going against his principles . . ." (emphasis

supplied). The standard applied by the trial judge in this case contains two possible grounds for disqualification: (1) an outright unwillingness to follow the law or (2) a willingness to follow the law reached only after deciding to violate personal principles. This two-fold standard of disqualification operated throughout the *voir dire*. The court questioned some venirepersons regarding the first ground and others, such as Murphy and Adkins, regarding the second ground.

The two-fold standard unavoidably conflicts with the proper standard described in *Witt*. A juror may be excluded for his or her views on capital punishment only when the trial court has the definite impression that the juror's beliefs would prevent or substantially impair the performance of duties in accordance with the instructions and oath. A belief does not "substantially impair" the performance of duty simply because it leads the person to oppose capital punishment: *Witt* states that trial courts have to distinguish among all those jurors who oppose the death penalty and may exclude only those opponents who cannot perform their duties in spite of their philosophical beliefs. 105 S.Ct. at 850-51. The *Witt* standard maintains an "essential balance" between

> the right to a jury panel drawn from a "fair cross-section of the community"—which if carried to its logical conclusion would require that a juror be seated who frankly avowed that he could not and would not follow the judge's instructions on the law —[and] the traditional right of a party to challenge a juror for bias—which if carried to its logical extreme would permit exclusion from jury panels of groups of people whose general philosophical views might have no bearing on their ability to follow a judge's instructions.

Witt, 105 S.Ct. at 852 n. 5. This balance was maintained in *Witt* because the questions asked by the prosecutor and the answer given by venireperson Colby led the trial

court to the reasonable conclusion that Colby's views about capital punishment would "interfere" with her ability to judge impartially the guilt or innocence of the defendant. The context of the questions and answers supported the trial court's conclusion that the term "interfere" was similar in meaning to "prevent or substantially impair." Colby was properly excluded because she had beliefs in opposition to capital punishment *and* because she positively indicated that those beliefs would prevent or substantially impair the performance of her duties as a juror.[3]

Philosophical views about capital punishment, standing alone, will not substantially impair a juror's performance of duty. The *Witt* opinion compels this conclusion, for if philosophical beliefs alone were treated as a substantial impairment of duty it would destroy the balance established in that case. According to *Witherspoon* and *Witt*, the Constitution prohibits a court from presuming that personal views regarding capital punishment will prevent a juror from conscientiously following the law, for some persons strongly opposed to capital punishment may nevertheless be able to follow the law when serving as jurors. Hence, personal views opposed to capital punishment must be accompanied by the additional belief that personal views in conflict with the law could or would not be put aside by a juror.[4]

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[3] The majority's confusion of these two types of beliefs leads it mistakenly to equate the positions of Colby and Murphy: "principles so strong that a juror would be unable without violating his principles to vote for the death penalty is at least as strong a factual basis for an exclusion decision as principles that would interfere with one's sitting as a juror." The flaw in this reasoning is plain. Colby stated that a conflict between belief and duty would interfere with performance of duty, while Murphy said only that a conflict would exist. The fact that a conflict exists between belief and duty tells a judge absolutely nothing about how the juror will react when faced with that conflict.

[4] There are reasons to think that this second type of conviction must be quite strong before it could disqualify a prospective juror.

The second ground for disqualification relied upon by the trial court in Darden's case excluded prospective jurors who expressed views about capital punishment but not about the circumstances under which they might ignore those personal beliefs. The court therefore used an incorrect legal standard to exclude venireperson Murphy. Its finding that Murphy was not legally qualified to serve on the jury is not fairly supported by the record as a whole. Hence, the presumption of correctness does not apply to this finding and Darden has proven that the exclusion of Murphy was incorrect, entitling him to habeas corpus relief.

IV. INADEQUATE DEVELOPMENT OF MATERIAL FACTS

The presumption of correctness also does not apply where the petitioner establishes "that the material facts were not adequately developed at the State court hearing." 28 U.S.C.A. § 2254(d)(3) (West 1977). Even if the trial court in Darden's case had been applying the proper legal standard to evaluate Murphy's qualifications, the presumption of correctness would still not apply because the court did not elicit sufficient information from Murphy upon which to base its finding of bias. Murphy's responses failed to give the court any evidence regarding at least one "material fact," namely, the relationship between his personal views and his ability to perform jury duty.

First, under *Witherspoon*, a venireperson had to display an absolute unwillingness to ignore personal views in conflict with a juror's duty. Since the *Witt* court stated that it was adhering to the same essential balance of interests struck by the *Witherspoon* decision, 105 S.Ct. at 852 n. 6, a very strong unwillingness to ignore personal views should be necessary. Second, the term "substantially" in the phrase "prevent or substantially impair" connotes some impairment of ability to perform duty approaching a complete impairment.

Murphy's ability to put aside personal beliefs regarding capital punishment was a material fact, crucial to the adequate consideration of Darden's constitutional claim. *See Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). As discussed in section III above, the trial court could not determine Murphy's qualifications without finding out whether and to what extent he could override his personal beliefs about capital punishment when they conflicted with his duties as a juror.

The trial court never elicited this crucial information from Murphy, for the question asked of Murphy never touched on this fact. It asked only whether Murphy held principles in opposition to the death penalty "so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts." This question asks whether the conflict between personal and jury duty holds true for every conceivable fact situation; in other words, it deals with the scope of the conflict without addressing Murphy's ability to resolve the conflict.

The court did ask other prospective jurors whether they could ignore their personal beliefs during the performance of their duties as jurors. In all likelihood, Murphy heard the court ask the others about this matter. Yet it would be unreasonable to conclude from this fact, as the State does, that when Murphy answered "yes" to a question about the content of his beliefs, he also meant to state that he was unable to override those beliefs. The court had addressed the earlier questions to persons seated in the jury box and not to the other prospective jurors in the courtroom. Murphy had reason to think that the court might ask him about his ability to subordinate personal belief to duty as a juror and he may even have considered what answer he would give. But the first question to Murphy asked only if he would have to violate personal principles in order to recommend a death sentence. He never had a chance to answer the second question as he might have expected. Because the court dis-

missed Murphy before asking about this matter, it failed to develop adequately a material fact.

The *voir dire* proceedings never revealed whether Murphy could override his personal views about the death penalty. This failure makes the presumption of correctness inapplicable to the trial court's finding of disqualification.[5] Moreover, by showing the lack of any evidence regarding Murphy's ability to override his personal beliefs, Darden has proven that the trial court was erroneous in its decision to exclude Murphy. He is entitled to habeas corpus relief.

V. CONCLUSION

The Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community gives the defendant an "inestimable safeguard" against the "corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451 (1968). A fair cross-section of the community includes those "jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Wainwright v. Witt*, 105 S.Ct. 844, 850-51 (1985). *Wainwright v. Witt* did not overrule the core meaning of *Witherspoon v. Illinois* and does not require this court to avert its attention when a petitioner claims that a state court violated his right to an impartial jury. Because the trial court in this case excluded a venireperson without determining that his views about capital punishment prevented or substantially impaired the performance of his duties as a juror, the district court improperly refused to grant habeas corpus relief. Accordingly, I dissent.

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[5] This failure to develop the facts necessary to establish Murphy's inability to serve as an impartial juror could fall within the exception of Section 2254(d)(3), a failure to develop the material facts, or the exception of Section 2254(d)(8), a lack of fair support in the record.

CLARK, Circuit Judge, dissenting:

I concur with Judge Johnson's dissent. I find compelling the following statement by Judge Hill in his special concurrence to our en banc court's reversal of the district court's denial of the writ of habeas corpus. 725 F.2d 1526 (11th Cir.1984) (en banc):

> A conscientious trial judge must be bent upon determining if a prospective juror has such a mind set that he or she would refuse to vote for the death penalty regardless of the evidence in the case. That is fact-finding. "The state of a man's mind is as much a fact as the state of his digestion." *Eddington v. Fitzmaurice*, 29 Ch. 459, 483 (1885) (Bowen, L.J.).
>
> Yet the record must contain sufficient evidence to justify a finding of fact that a venireperson was of such a mind set that he or she was, under the law, disqualified, or the finding cannot be said to be supported. In Mr. Murphy's case, there was not sufficient evidence. He was clearly shown to be a person who could not vote in favor of capital punishment without violating his principles. He was not asked (so he never said) whether or not, if the evidence were sufficiently strong and the circumstances sufficiently aggravating, he could nevertheless vote to recommend the death penalty.
>
> Judge Fay recounts for us the painstaking and conscientious efforts of Judge Dewell to adhere to the teachings of *Witherspoon* in the voir dire proceedings. Is seems clear that Mr. Murphy heard and, no doubt, understood what had been asked of those who had been examined before him. One must assume that he fully expected to be asked, after he had acknowledged his principled opposition to the death penalty, whether or not he could nevertheless vote in favor of it if the evidence in the case indicated it to be appropriate under the law. For aught appearing,

> he may have felt compelled under his oath to say that he could. Until it appeared that he could not, he was not disqualified. Applying the teachings of *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), the writ must issue, conditioned upon resentencing.

725 F.2d at 1551 (footnote omitted).

The Supreme Court made crystal clear in *Wainwright v. Witt*, 496 U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) that it reaffirmed the standard it had set in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) when it said:

> That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

105 S.Ct. at 852 (quoting from *Adams*) (footnote omitted).

It is clear that juror Murphy was never given an opportunity to state whether his views would prevent or impair the performance of his duties.

I also dissent on the issues of prosecutorial misconduct and ineffective assistance of counsel as I did initially as a member of the three judge panel, 699 F.2d 1031 (11th Cir.1983) at pages 1040-1043.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,
PETITIONER-APPELLANT, CROSS-RESPONDENT

v.

LOUIE L. WAINWRIGHT,
Secretary, Department of Corrections, State of Florida,
RESPONDENT-APPELLEE, CROSS PETITIONER

Aug. 27, 1985

Appeals from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING
DIRECTED TO THE EN BANC COURT

(Opinion filed July 23, 1985 11th Cir., 767 F.2d 752.)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C.A. § 46(c).

PER CURIAM:

At the request of one of the members of the en banc court, the court has been polled on the petition for rehearing addressed to the en banc court. Less than a majority of the en banc court, and less than a majority of the judges in regular active service, have voted in favor of the petition. The petition for rehearing is, therefore, DENIED.

At 9:00 a.m. Tuesday, September 3, 1985, the mandate will issue and the stay of execution heretofore and presently in effect shall terminate.

CLARK, Circuit Judge, dissenting:

I dissent from the denial of petitioner's motion for rehearing en banc in this case. Using either the *Caldwell v. Mississippi*, —— U.S. ——, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), or the *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir.1985) (en banc), standard,[1] Darden is entitled to habeas corpus relief due to the prosecutor's closing argument at the guilt/innocence phase of his trial.[2]

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[1] As I noted in my dissent from the denial of rehearing in *Brooks*, the majority's use of the *Strickland v. Washington* [—— U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] prejudice standard cannot be reconciled with the Supreme Court's utilization of the "no effect" test in *Caldwell*. *Brooks v. Kemp*, No. 83-8028 (July 23, 1985) (Clark, J. dissenting). Rehearing should be granted to clarify the discrepancy between the language of the en banc court in *Brooks* and that of the Supreme Court in *Caldwell*. Using either, however, Darden is entitled to relief.

[2] A review of the record clearly indicates that the prosecution made its sentencing argument at the guilt/innocence phase. Early in Mr. McDaniel's argument he stated:

> I will guarantee you I will ask for death [at the penalty phase]. There is no question about it. The second part of the trial I will request that you impose the death penalty. I will ask you

No one, not even the State, as the district court noted, has ever asserted the arguments given by the prosecutors in this case were anything but improper. *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla.1981). The magistrate in this case concluded: "I am convinced . . . that the jury was prejudiced against Darden by the argument." Under the new *Brooks* test, prejudice is the key element that a petitioner must demonstrate.

The most important factor in this case is the evidence the State presented against Darden. The evidence against Darden was far from overwhelming. Essentially, the State's case hinged on the identification of Darden by two eyewitnesses, the victim's wife and a young boy employed part-time by the victim. There was very little corroborating evidence. Darden at all times denied any involvement in the crime. Furthermore, as I argued in my dissent to the original panel opinion, the eyewitness identifications were conducted, at the very least, in a highly suspect manner. *Darden v. Wainwright*, 699 F.2d 1031 at 1040-41 (11th Cir.1983) (Clark, J., dissenting). The closing arguments in numerous improper instances emphasized the reliability of eyewitness identification testimony, the lack of credibility of Darden as well as his "animal" nature, and stressed that death was the only sentence that would protect the public.

Using the *Brooks* test, the strength of the evidence against the accused is a factor in determining whether the argument exceeded constitutional limits.[3] It would seem that the evidence here is weaker than in any of the four cases recently decided by the en banc court. The argument is as egregious as any. Thus, it would seem that the "but for" or prejudice test of *Brooks* has been

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to advise the court to give him death. That's the only way I know that he is not going to get out in the public. It's the only way I know. It's the only way I can be sure of it.

[3] In *Brooks*, the majority at one point stated: "an outcome based on weak evidence might be more likely to have been affected by errors than one based on a very strong case." 762 F.2d at 1385.

satisfied in this case. Certainly it cannot be said that the argument had no effect on the sentencing decision. *See Caldwell, supra*, 105 S.Ct. at 2646. Therefore, I dissent.

KRAVITCH, Circuit Judge, dissenting:

Because Darden's prosecutorial misconduct claim has not been evaluated under current legal standards (*Caldwell v. Mississippi*, —— U.S. ——, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir.1985) (*en banc*)), I dissent from the denial of rehearing.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 85-1420-Civ-T-10

WILLIE JASPER DARDEN, PETITIONER

—*vs*—

LOUIE WAINWRIGHT, RESPONDENT

ORDER

Upon due consideration, and for the reasons stated in the Respondent's motion to dismiss, the Petitioner's second petition for a writ of habeas corpus pursuant to 28 USC 2254 (filed September 3, 1985) is hereby DISMISSED with prejudice as an abuse of the writ. 28 USC 2244(b) and Rule 9(b) of the Rules Governing Section 2254 cases. See *Woodard v. Hutchins*, —— U.S. ——, 104 S.Ct. 752 (1984). See also *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983); *Sullivan v. Wainwright*, —— U.S. ——, 104 S.Ct. 450 (1983); *Antone v. Duggar*, —— U.S. ——, 104 S.Ct. 962 (1984). For the same reasons, the motion to stay is denied as is certificate of probable cause for appeal pursuant to Rule 22(b), F.R.A.

IT IS SO ORDERED.

DONE and ORDERED at Miami, Florida, this 3rd day of September 1985. 7:35 p.m.

/s/ Wm. Terrell Hodges
United States District Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-3700

WILLIE JASPER DARDEN, PETITIONER-APPELLANT

v.

LOUIE L. WAINWRIGHT, RESPONDENT-APPELLEE

Sept. 3, 1985

Appeal from the United States District Court
for the Middle District of Florida
Wm. Terrell Hodges, Judge

ORDER

Before FAY and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.

BY THE COURT:

The emergency motion of appellant for stay of execution is DENIED. The motion of appellant for certificate of probable cause is DENIED. The motion of appellant for leave to proceed on appeal in forma pauperis is GRANTED.

SUPREME COURT OF THE UNITED STATES

No. 85-5319 (A-181)

WILLIE JASPER DARDEN

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections

Decided September 3, 1985

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI AND IN FORMA PAUPERIS

Upon the request of counsel for the petitioner, the application for stay of execution has been considered as a petition for a writ of certiorari. The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

The order of this date denying the application for stay is vacated. The application for stay of execution of the sentence of death is granted pending the sending down of the judgment of this Court.

JUSTICE POWELL, concurring in the granting of the application for a stay.

My vote is to grant the application for a stay, although I find no merit whatever in any of the claims advanced in the petition for certiorari. All of these claims have been carefully considered and repeatedly rejected by the courts below, including as recently as this afternoon the Federal District Court for the Middle District of Florida, and this evening the Court of Appeals for the Eleventh Circuit. Indeed the petition for certiorari was merely the stay application that had been denied, and restyled on the request of counsel as a petition for certiorari. But in view of the unusual situation in which four Justices have voted to grant certiorari (doing so without waiting for the Court of Appeals to act on Darden's second federal habeas petition that was before that court this evening), and in view of the fact that this is a capital case with petitioner's life at stake, and further in view of the fact that the Justices are scattered geographically and unable to meet for a Conference, I feel obligated to join in granting the application for a stay.

THE CHIEF JUSTICE, dissenting.

In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden v. Florida*, 430 U.S. 704 (1977) (certiorari dismissed as improvidently granted); *Darden v. Wainwright*, —— U.S. —— (1984) (certiorari denied); *Wainwright v. Darden*, —— U.S. —— (1985) (vacating and remanding); *Darden v. Wainwright*, —— U.S. (1985) (order dated September 3, 1985 denying application for stay), and have been litigated before no fewer than 95 federal and state court judges. Upon review of the petition and the history of this case, I conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion

when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent.

JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would deny the application.

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1985
CERTIORARI GRANTED SEPTEMBER 3, 1985

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UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Excerpts Of Trial Proceedings On Habeas Corpus.

* * * *

[272] MR. PROSPECT: I do not foresee one, no, sir.

I will go on record, no, I will not recall them.

THE COURT: Well, it will be the ruling of the Court that you will not be permitted to do so. Under those circumstances, do you want them to remain in the courtroom?

MR. PROSPECT: If they wish to.

THE COURT: All right, they may do so.

MR. PROSPECT: Thank you.

THE COURT: Would you administer the oath, please.

Thereupon:

RAYMOND A. GOODWILL, JR., a witness on behalf of Respondent, having been first duly sworn, was examined and testified as follows:

THE CLERK: Repeat your name for the record, please.

THE WITNESS: Raymond A. Goodwill, Jr.

DIRECT EXAMINATION

BY MR. PROSPECT:

Q. Mr. Goodwill, will you please state your occupation and your address.

A. I am an attorney at law. I practice at 107-A Avenue Northwest, Winter Haven, Florida.

[273] Q. For how long have you practiced law, sir?

A. I was admitted to the Bar in 1965.

Q. What was your occupation in that regard in the fall of 1973?

A. At that time I was employed part time as an Assistant Public Defender for the Tenth Judicial Circuit.

A. Who was your boss?

A. Jack Johnson.

Q. How many hours would you say you devoted between your part-time duties to the Public Defender's office and, I assume, to your private office?

A. Yes, sir.

Q. Could you give us a breakdown, approximately, of your hours devoted prior to the Darden trial?

A. I was assigned to be in Bartow at least two days a week and, of course, the amount of time I would spend would vary depending on the case load at any particular time.

It was a very strong caseload, especially for those of us that were trying—actually trying cases, so it would vary depending on what types of cases were coming up. The time spent in Bartow was two days a week, basically, unless a trial carried over or something of this sort.

[274] Q. When you say assigned to Bartow, did that involve everything from the initial stages of a criminal trial through the conclusion?

A. Not necessarily. Some cases—I primarily tried cases during that period of time.

Q. I see.

A. And would not be involved, as a general rule, with the initial contact with the client at the office.

Q. When did you first come in contact with Mr. Darden?

A. Late in the fall of 1973.

Q. Can you give me an idea of at what stage the case was from the Public Defender's standpoint—was in stage of development?

A. May I refer to some notes of the file that I have that—

Q. Would you please identify the notes—the source of the notes?

A. The notes I'm referring to now are notes that I made from the court file in Bartow, in going through the various documents that were contained in that actual court file.

Q. You mean, in the public records?

A. In the public records. And I jotted down notes from that rather than get a copy of the progress docket [275] or something of this sort.

Q. Have you had occasion to examine the court file or copies of the—not court file, I'm sorry—but the Public Defender's file that was provided Mr. Johnson last Friday?

A. I have previously reviewed what was in—what was given to us as the trial file. It was not complete. But the documents that were contained therein, I did have a chance to look at, yes.

Q. In what respect, sir, was it not complete? Can you think of any specific examples?

A. Well, there are numerous things—may I refer to some of the things in the file?

Q. Absolutely, yes.

A. This is the trial file that was given to us, which I first saw yesterday.

I have a Xerox copy of a list of documents from PD file re: Willie J. Darden, CF 73-2027C, signed by Mr. Darden. Noted, received the above documents this 31st day of December of 1973.

There is listed—there are certain things listed. One is a summary of an interview Jim Hill had with Bill Barnes. Jim Hill was the investigator hired by the Public Defender's office. That is not contained in the file.

[276] The statement of Ms. Macie Wright, No. 3 on the list—that is not contained in the file.

4, Statement of Ms. Christine Bass—that is not in the file.

The statement of Thomas Joseph Diggins, which is No. 10, is not contained.

Those specifically are the things that I recall were in the file at the time we were preparing for trial, that are not in there now.

Of course, it's been five; six years since the time I last saw this file, and I don't have any way of knowing if there are other things not contained in there or not. Specifically, these things are not contained in there.

Q. Were those statements made as a result of an investigation made by Mr. James Hill?

A. Yes, sir.

Q. Mr. James Hill was the investigator for the Public Defender's office?

A. Yes, sir.

Q. Had you had experience with him prior to the Darden trial?

[277] A. Some limited experience, yes. He had investigated other cases in the office for us.

Let me retrack for just one second. It's hard for me to tell from these things whether or not the statement—unless it says statement of interview with Mr. Hill—whether or not it was a statement made to Mr. Hill. It may very well have been a statement which was made to an investigator, either from the Sheriff's Department or from the State Attorney's office, we had access to.

Q. I see.

A. So I can't tell, for example, whether or not these were Mr. Hill's statements or the other, although I feel that they were Mr. Hill's.

Q. All right, sir. When in the fall of 1973 you were assigned to Mr. Darden's case, who made the assignment, sir?

A. Mr. Johnson.

Q. At that point in time you had approximately—you were admitted in '65—eight years of legal experience in practicing law.

A. Yes, sir.

Q. Had you had any legal experience prior to that?

A. Yes, sir.

[278] Any capital cases prior to that?

A. Yes, sir.

Q. What would you describe as the percentage of criminal cases to all other cases that you practiced for those eight years?

A. Well, at that time I had been with the Public Defender's office, if I'm not mistaken, about three to three and a half years, and there's no way that I can even guess how many cases I handled during that period of time.

I know that practically every Tuesday or Wednesday that I would have anywhere from five to eight cases which were ready to go to trial at that time.

Q. Would it be fair to say that your practice in criminal law from the defense standpoint was extensive?

A. Yes, sir, I think that would be a fair statement.

Q. How many capital cases had you handled prior to Darden?

A. I believe in one year prior to the Public Defender's office, either being established or handling capital cases—in

other words, when the Circuit Court was appointing attorneys to represent indigents in capital cases, I believe in one year I had thirteen or [279] fourteen assigned me.

Q. Capital cases?

A. Capital cases.

Q. As you began the investigation into the facts surrounding the charges against Mr. Darden, what did you find? In other words, what was the evidence that you had become aware of and by whatever means?

A. From what point?

Q. From the initial point forward, or at least until I stop you.

A. Well, of course, we had some contents in our file at the point in which I became involved—you asked me about when that was, and all I can tell you is that I noticed that the first document which was filed by me was filed on November 1st of 1973—of course, I had the contents of that file.

We also had availability to the State Attorney's files—a reciprocity type agreement that we had with the State. In other words, there was not a necessity to file a formal discovery motion in order to receive information from the State Attorney. It was a carte blanche situation as far as almost going in and looking at their file at any time we wished.

Of course, I learned the basic facts of the crime, itself. I observed that Mr. Darden had made a [280] statement initially to Mr. Hill shortly after arrest. Sometime subsequent to that he made another statement, I believe, to Mr. Johnson—I'm not sure—where it varied somewhat with the earlier statement that he had made.

As I recall, I interviewed Mr. Darden and briefly recapped the statements and got his side of the story.

Q. Well, before we get to that, what did you find that the State had against him?

A. At the point that I became involved the State basically had two witnesses who had identified him.

Q. Did they have any physical evidence in terms of fingerprints? Ballistics?

A. No, sir.

Q. Nothing in that regard?

A. No, sir, absolutely not; never did.

Q. Now, getting back to your discussions with Mr. Darden. How was he as a client?

A. I never felt that I had any problems with Mr. Darden. I thought he was as open as he could be under the circumstances with me.

I tried to lay out the things to him—the facts, what our procedures would be. Many times after we would talk and I would not think there would be any [281] problem, we would then be met with motions which were filed by him.

Q. Did you find him to be new in the criminal justice system?

A. No, sir. He had had, apparently, a fairly long history of being involved in the system.

Q. Did you find he had perhaps a familiarity or grasp on what you were telling him in terms of procedure in the law?

A. I wondered where he obtained all of his legal knowledge from.

Q. All right, sir.

A. Because some of the motions that were filed, apparently—well, what we refer to as "jailhouse motions," and I assume in fact—I think he even told me he learned some law from some disbarred lawyers, something of this sort, down at Avon Park.

Q. Did Dennis Maloney assist you in any of your personal preparation on this case and, if so, beginning at what time?

A. The case was—it's hard to identify the involvement of any one particular person up to a point—up to the point of actually going to trial. The case was assigned to the Public Defender and as so, many times that—we did prior to that time—the [282] Public Defender's office handled the case, and many people had input.

We would discuss various things with other members of the staff. If there were good, viable ideas that came out of the discussions, we would pursue them. So it really was a team-work type thing up to a point, and I'm sure even before I became intimately involved with the case, I had a certain amount of input or had been included in discussions to that point, regarding the case.

Q. Do you know whether Mr. Maloney, as a member of the staff, had any input prior to your involvement?

A. Oh, I feel certain that he did.

Q. All right. When you came on the case, was Mr. Maloney assigned to you in any capacity?

A. No, sir.

Q. Did he have any function in the case in relation to you?

A. As I recall, Mr. Maloney was not actually assigned to help me on the case until—it may have been after we were reappointed to represent Mr. Darden, which would have been January 9th, or subsequent thereto.

Q. And what did this help consist of? In other words, what was he supposed to do to help you?

A. Generally, assist me in trial. As I recall, [283] I went to Mr. Johnson and told him that it was an extremely complicated case, that there was a lot of witnesses to worry with, that we had a lot of legal points to raise, and that I would feel that it

would be most helpful if I had somebody to assist me generally in the trial.

The one specific thing I recall asking him to do was prepare the research on the issue of the identification, the Arnold boy identification involving photograph identification after the Public Defender's office was appointed to represent Mr. Darden, which we felt was improper.

As far as specific, that is the only specific thing that I can recall I asked him to do, other than generally assist me at trial.

Q. Was it your contention that he conduct any phase of the trial before the jury?

A. Yes, sir.

Q. It was an agreed upon intention, or was it just your intention?

A. It was my intention and I understood that Mr. Maloney understood it.

Q. That he would participate before the jury.

A. Yes, sir.

Q. To a limited degree or greater or less?

[284] He would participate insofar as witnesses that were not—I don't know how to characterize them—not the primary witnesses, not the most incriminating witnesses—witnesses which were, say supplemental.

Q. All right, sir. In response to the evidence you found the State had against your client, what did Mr. Darden tell you with regard to a proposed defense?

A. Well, the defense, of course, was that he was innocent.

Q. Absolutely.

A. And that he was not there, and that he did not do it.

Q. What did he tell you in that regard, with specificity?

A. He laid out a fairly lengthy series of events which occurred that day, from the standpoint of trying to establish an alibi for his whereabouts.

As a result of that discussion or several discussions that I had with him over that, I filed a motion with the court to allow Mr. Darden to be released from jail, under certain security measures, to go with me to retrace his steps on that day, because he was very vague about where certain things were because he was not familiar with the surrounding—

Q. Was he permitted to do that?

[285] Yes, sir.

Q. This was a capital defendant?

A. Yes, sir.

Q. To your knowledge or in your experience, had that ever happened before?

A. No, sir, and I wasn't sure the court would grant the motion when I filed it.

Q. But, nevertheless, it was granted.

A. Yes, sir.

Q. Describe the conditions of this trip and its purpose.

A. The purpose was to allow Mr. Darden to retrace or to take me to certain places where he said he had been that day—the day in question—with the view toward trying to obtain witnesses which would be helpful to place him in those various locations on that day.

The conditions were that it would be done under proper security, there was a Polk County Deputy Sheriff, as I recall which drove—it was a station wagon—Polk County Deputy Sheriffs drove the vehicle.

I know that Mr. Darden—I don't know, I take that back. It was my recollection that Mr. Hill was present on that trip.

Q. Which Mr. Hill?

A. Jim Hill.

[286] Q. The investigator?

A. Right.

And the statement that I alluded to a minute ago that Darden made during the trip, I don't recall whether there is a tape recording made of his comments, by Mr. Hill at that time, or whether Mr. Hill made notes. It's my recollection that there was a tape recording made of the trip, but I could be in error.

Q. Prior to the trip and prior to your moving to take the trip, had Mr. Darden told you or had your investigation revealed Christine Bass?

A. I don't know exactly when we became aware of Christine Bass—whether it was before or after.

Q. Do you recall how you became aware of her?

A. No, sir, I don't.

Q. Could it have been from Mr. Darden?

A. It could have been from Mr. Darden. It may have been from a response to discovery that we filed, that was provided by the State.

Q. Did you ever talk to the lady, personally?

A. No, sir.

Q. Did you ever read a statement of hers?

A. Yes, sir.

Q. Can you remember what the statement said?

A. In very general terms; that a black male had [287] had car trouble in front of her house; that his car was apparently blocking the road; that they pushed it off the road somewhere near her house; that she went out to assist or see if she could assist. There was some discussions about calling a wrecker.

As I recall, some neighbors of hers, some real estate people that were neighbors of hers, the Lawhorns, apparently came out to try to help this individual. That ultimately the car was fixed, and the individual left.

Q. Do you recall any time?

A. Again, without having her statement that was in our file, I don't recall except the fact that, to the best of my recollection, it placed it somewhere between 5:00 and 5:30 on the day in question.

Q. All right. What did your investigation reveal in terms of the time the crime was committed and the time Mr. Darden was involved in the automobile accident? In that regard, I hand you Petitioner's Exhibit No. 12, 14, 15, 16 and 17, and ask you if that will assist you.

A. Sequentially, it's difficult for me to reconstruct when this information became available to me. I was aware, based on the report that was filed with the Sheriff's Department of Polk County, that the call [288] regarding the murder came in at 6:31; 1831 hours, and that Sgt. Don Neal was the first unit to respond, arriving at 1834 hours or 6:34.

I also took a deposition of Mrs. Edith Hill and I note that you have—I don't know where this statement came from—this exhibit.

Q. What number, sir?

A. 16.

Q. I believe that's been identified as a statement from Investigator Jim Hill, taken on October 23rd, '73, at 5:30 p.m.

A. I don't remember seeing this in our file yesterday when I looked at it.

We had a statement from Mr. Hill, also. I followed it up with a deposition of Mrs. Hill, who indicated that she heard shots and that all of this occurred around 6:30 in the afternoon.

I also had a copy or saw a copy of an accident report which was either a Florida Highway Patrol accident report or a Hillsborough County Sheriff's Department accident report, which indicated that the accident occurred at 6:35 p.m.

Q. Did you have any information which you could utilize to place Mr. Darden anywhere between 5:30 p.m. and 6:35 p.m.?

[289] A. No, sir.

Q. Did he give you any?

A. No, sir.

Q. Was that the purpose of the in-custody trip?

A. Yes, sir.

Q. What was the result of that in-custody trip?

A. Excuse me. That, and to retrace his steps prior to that point.

Q. Thank you.

A. There was discussion about a muffler being fixed and things of this sort that had happened prior to the actual breakdown of the car.

Q. Did the trip substantiate the breakdown of the car?

A. The trip was rather vague. It was not exact as to places, times, locations. "Is this the place?" "Well, I'm not sure. Let's go over there." We'd go over to another place. "No, that's not where it was, either."

It was one of those series of things. I think we did identify, or he did identify for our purposes, a Gulf station where he had gone, or where he said he had gone to get a muffler fixed. As a result of that, Mr. Hill talked to the employees—I think Mr. Darden indicated to me that there was a young boy [290] working there and that he had fixed the muffler—as a result of that, Mr. Hill interviewed the young man that was working

there and the young man said that no one had come in with muffler trouble on that day.

Q. Was it before or after that trip that Mr. Darden told you he wished to present the defense of alibi?

A. You mean formal defense?

Q. Not necessarily formal, anything. Anything in that line.

A. Well, alibi had been the defense.

Q. From the beginning?

A. From the beginning, from the initial statement given to Mr. Hill.

Q. As a result of your entire investigation, including the trip, interviews, reading of statements, whatever, what was your professional assessment of the possible success of an alibi defense?

A. I personally drove the distance from Ms. Bass's house to the scene of the crime at a normal rate of speed, at approximately the same time of day, on the same day of the week; and it was possible to get from one place to another for the things to have occurred.

It was my feeling that to present an alibi defense with a gap in which the critical period was [291] left unanswered, would have been—it would have done more harm than good.

Q. Did you have any reason to believe that Ms. Bass was being anything but truthful when she stated that she had seen Mr. Darden in front of her house at approximately 5:30, 5:35?

A. I had no reason to doubt Ms. Bass's truthfulness at any time.

Q. So he could have left her house at that time, still have committed the offense, and have been involved in the accident at 6:35?

A. That is what the evidence showed.

In addition to that, we had—excuse me a moment.

(Witness reviews his file)

What I'm looking for is something in our file. I can't seem to locate it. I saw it this morning.

We contacted the Silver City Garage. Mr. Hill—James Hill—contacted the Silver City Garage, who indicated that a wrecker had been dispatched to a DAV vehicle at 5:40 at that location.

Q. Excuse me. What is a DAV?

A. Disabled vehicle.

Q. Thank you.

A. At 5:40, and the description or location where [292] it was dispatched to was approximately the same.

Q. I'm handing the witness Petitioner's Exhibit No. 26.

A. Yes, sir. This is what I was referring to. That a wrecker was dispatched to Lakeland Hills Boulevard and Joker Marchant Stadium, at 5:40, and that the car was 1022, which means that it was canceled because the car was gone, at 5:40.

As I recall, Christine Bass could testify to the last time she saw him, but could not get specific about what time it was he left there; although, as I recall, the Lawhorns were much more specific about what time he left.

We followed up on this because there was some question about a call being made to the wrecker company to come and tow him off.

To backtrack just a little bit, also on the alibi—we contacted two officers of the Lakeland Police Department who were sent out to the scene because two cars were blocking an intersection at Lakeland Hills Boulevard and Marchant Stadium. This was information that Mr. Darden had given us, that two Lakeland police officers had come out to the scene.

Q. Did he have any names for you?

A. No, sir, I don't think he did, and I don't [293] seem to recall exactly where he got them from; perhaps called the Lakeland Police Department, had them check their log for that day.

Anyway, they arrived at 4:39 p.m., they left the scene at 4:43 p.m. This was fine, because it was prior to the time but it didn't assist us in the critical period.

The Hillsborough County Sheriff's Office was also contacted by Mr. Hill—by James Hill—at my request. They indicated to him that they received a telephone call at 1832 hours, 9-8-73—this would be 6:32, from a person calling from the area of the Lakeland Lounge advising them of an auto accident on the new Tampa Highway.

Q. So because of the gap from 5:30, 5:35 until 6:32 or 6:35, I believe you testified that it was your judgment, ill-advised, to present or even think about presenting any alibi defense; is that correct?

A. Yes, sir. If we had presented that alibi defense, the State would have come with rebuttal on the alibi that I think would have been devastating.

Q. How do you know that?

A. Subsequent to the trial, Mr. McDaniel told me that he was just hoping that I would put on the alibi.

[294] Q. Why is that?

A. Because he had also retraced his steps, knew what the distance was and was prepared to put testimony on as to how long it would take from one place to another, and that would or could still place Mr. Darden at the scene of the crime.

Q. So it turns out that you made a good judgment in light of that.

A. Not according to Mr. Harper.

Q. I show you Exhibit 1—Petitioner's Exhibit 1—and ask you if you remember receiving that from Mr. Darden?

A. Yes, sir.

Q. Would you read the last paragraph, the written paragraph, after the list of witnesses, out loud, please?

A. "Mr. Goodwill, I would like to talk to you right away. Thanks. If you think that there are some of these witnesses that you would not want, please feel to choose on your own whether or not they will be helpful, or you also may have the privilege to add or to take away from this list. Thanks. Willie J. Darden."

Q. Is that a list beginning with Ms. Macie Wright and ending with Mr. Charlie Tyus?

A. No, sir, this list actually ends with Mr. [295] Jim Hill?

Q. Is Mr. Charlie Tyus before Mr. Jim Hill?

A. Yes, sir.

Q. All right, sir. Do you recall when, or does that reveal when you received that?

A. It's not dated.

Q. Would it be safe to assume that it was received prior to trial?

A. Yes, sir.

Q. In light of this statement?

A. Yes, sir.

Q. Would you read the statement that I just pointed to?

A. "Please subpoena the below listed witnesses for trial on January 15, 1974, witnesses for trial in Citrus County."

So it had to be given to me subsequent to December 27th, 1973, because that, I believe, was the date the change of venue motion was granted.

Q. I show you Petitioner's Exhibit No. 2 previously identified as a notice of intention to claim alibi, dated January 10th, 1974, and signed by Mr. Dennis Maloney. Were you aware that that was filed?

A. Yes, sir.

Q. Did you agree that it should be filed?

[296] A. Yes, sir. I'm sure that I did. It wouldn't have been filed if I hadn't.

Q. Well, could you explain to me then, in light of your testimony to the effect you thought a defense of alibi would be useless or ill advised, why did you file it? Or why did you agree to its filing?

A. We had been recipients, as well as the Court, of numerous motions filed by Mr. Darden, himself. We had gone through numerous hearings where first he wanted us off the case, and then he didn't want us off the case, and I think that my feeling at that point was that we were going to go ahead and subpoena these people in order to cover ourselves if he ever comes back and says, "Well, I wanted these people subpoenaed for trial, and he refused to do it."

So we went ahead and subpoenaed them. Although let me say that I was already aware that John D. Stone, Lee Michael Stone—and all the Stones—were State witnesses. Mary Simmons was a State witness. Several of these on here had already been subpoenaed by the State.

Q. When was the decision not to present an alibi defense made?

A. When was it ultimately made?

Q. Yes, sir.

[297] At the close of the State's case.

Q. By whom was it made?

A. By Mr. Darden and by myself.

Q. Would you elaborate on that, please, sir—how it came about?

A. Well, at the close of the State's case Mr. Maloney and myself went into an anteroom, which was being used as a holding cell—I guess you would call it—immediately outside of the courtroom, where Mr. Darden was being held during the recesses, et cetera.

I recall that there were two guards at the door. Mr. Maloney and I were frisked before we went in as far as ballpoint pens, keys and things of this sort. And at that time we had a very lengthy discussion with Mr. Darden regarding this alibi situation.

I told him very directly that I thought that the worst thing we could do was to put on a poor alibi. At that point we had the tail-end of the alibi, the tail-end being Mr. Stone, the man involved in the accident or that observed the accident that Mr. Darden had, which was fairly well agreed upon that he was there at that point and he had admitted all along that he was in the accident—that was not an issue—and Mary Simmons, who had taken him to Tampa.

Again, I told him that I did not think that [298] we should put on an alibi, that we would lose closing argument, for one thing.

Q. How was that, sir?

A. Well, if you put on anybody other than the defendant, you're going to lose your right to close to the jury.

Q. Is that under Florida Rules of Criminal Procedure?

A. Yes, sir.

Q. Thank you. Continue.

A. There was somewhat lengthy conversation about it. I believe I told him that I felt the best thing to do was to go ahead and let him take the stand and let him fill in the front part of the alibi.

Q. What would be the front part?

A. Well, up to the accident—the automobile accident.

Q. After Bass, before Stone.

A. Well, actually the whole day.

Q. All right.

A. He testified as to what his activities had been through the entire day.

Feeling that this probably—that this part of it would probably not be rebutted, and then we had the back end of the alibi going with the State witnesses. [299] So we could use the State's witnesses to prove part of our alibi, Mr. Darden could testify to the front part of it and we would still retain closing argument.

Q. When you say "retain closing argument," don't you mean the number of closing arguments?

A. Right. Well, the right to make the last closing to the jury.

Q. The last words the jury heard.

A. Right.

Q. By not putting on any other witnesses other than Mr. Darden, you secured that right.

A. Yes, sir.

Q. And, in fact, exercised it.

A. Yes, sir.

Q. Okay. What was Mr. Darden's response to your advice and statement?

A. He agreed with them.

Q. He agreed?

A. He agreed.

Q. He agreed that no alibi witnesses should be presented?

A. Yes, sir, after we went through what we had, he agreed that what we were discussing was the best thing to do.

Q. And that the strategy would be best to let [300] him take it in his own words?

A. Yes, sir.

Q. Do you recall receiving from Mr. Darden what has been identified as Petitioner's Exhibit No. 9, a list of questions from him which he desired you to ask him?

A. I have a recollection of receiving this, but specifically no, I don't recall it; but it's very possible that I did.

Q. Do you possibly recall whether you read the questions?

A. If they were given to me, I read them.

Q. There are certain notations in the left-hand margin, consisting of question marks, stars, X's and other marks or other notations. Do you know of your own recollection whether you made those?

A. The question marks aren't mine. The X's look like they could be.

Q. Would you have any idea what the X's mean?

A. I think it would be pure speculation.

Q. All right. Is is possible that the X's meant in your opinion these questions should not be asked?

A. It is possible.

MR. HARPER: Your Honor, if it please, on those I object. On those I have gone just as far as I [301] can. The witness hasn't even been able to, first, identify them. He indicated he recalls one question. He recalls seeing the document. That in fact he asked the question did he make the marks. It's just been pure speculation up until now. For him to speculate, but yet admit something that he doesn't know whether he or Mr.

Maloney put them on there, is just about as far as I can go without objecting. I object to it as being pure speculation on the part of the witness.

THE COURT: What's your response, counsel?

MR. PROSPECT: Nothing.

THE COURT: Sustained.

BY MR. PROSPECT:

Q. Mr. Goodwill, if I could back you up now, did Mr. Darden ever ask you to arrange for a lineup or to take a polygraph examination?

A. No, sir.

Q. Did you ever approach Mr. Darden with the suggestion that he plead guilty in return for a life sentence?

A. It's possible.

Q. Do you know whether the State or the prosecution, that is—first, let me ask you this. Did the State ever approach you and say they were willing to deal?

[302] A. No, sir.

Q. Did you have any indication or reason to believe that they might be willing to deal?

A. No, sir. Quite the opposite.

Q. Then your suggestion, perhaps, that Mr. Darden plead was based on, what?

A. How do you mean, what?

Q. Well, could it be the possibility that you could get a deal worked out?

A. Well, if the individual is not going to go along with the deal, there's no use in going and getting the deal to begin with. My indication from the State was that they would have never dealt.

Q. Did you refuse to take depositions of witnesses?

A. No, sir.

Q. Did you refuse or fail to interview witnesses?

A. Which witnesses?

Q. Any witnesses.

A. Requested by Mr. Darden?

Q. Yes, sir.

A. It's possible.

Q. Would there be a reason for your refusal?

A. Well, number one, I'm not saying that I did.

Q. I realize that.

[303] A. It's possible, and the reason for it would be that, in a murder case, there has to be somebody to control the conduct of the trial and the preparation for the trial. The reason I say that it's possible that I may have refused it, is because it may have been something right off the wall, had no relevancy.

If it was relevant, I did not refuse.

Q. Did there ever come a point in time during the entire representation that you afforded Mr. Darden that you were forced to, more or less, sit him down and tell him that you were in charge and that you were conducting the defense in the manner you saw fit and if he didn't like it, he could move to dismiss you—or words to that effect?

A. I don't recall ever saying that to him.

Q. Did you ever tell him that you were the one that was going to conduct the defense in this case, and he had no business doing so?

A. Not that I recall.

Q. In your experience, have you ever had a defendant that required your telling that?

A. In so many words?

Q. Or very generally to that effect. In other words, establish who's the boss.

A. I think you're taking an isolated situation.

[304] I was not trying the case as co-counsel with Mr. Darden. However, he had treated the situation as if I were co-counsel, as if the entire Public Defender's office were co-counsel, by filing his own motions.

We requested that he stop doing this. If he had things that he wanted filed, please let us know and we would file them in proper form.

Yes, sir, in the middle of a trial or something like that when you're being interrupted, when you're trying to listen to testimony from the stand and he's interrupting you, it's possible I may have turned to him and told him to shut up and I'll run the defense.

Q. Was Mr. Darden denied the opportunity to participate in any aspect of his defense?

A. Mr. Darden sat at counsel table, and, as I recall, every decision of any major import was discussed with him. Why things were being done, why things weren't being done, procedures that were being followed, et cetera.

Q. Did you ever tell him that he should plead guilty because he was in Polk County, Florida, and that he had killed a white person, and that under those circumstances it was not a situation in which he should [305] be?

A. Did I ever tell him that he should plead guilty—

Q. Because—

A. —because he killed a white person? No, sir.

Q. How would you describe your attitude toward Mr. Darden—overall?

A. Perhaps at times, aggravated. But, generally, I truthfully don't feel that I had any problems with him.

Q. Did you ever tell Mr. Darden that he couldn't expect the Public Defender or the Public Defender's office or you to investigate every little detail that he gave you?

A. It's possible.

Q. Did you ever fail to answer any inquiries that he made of you?

A. Not that I recall.

A. When the change of venue was granted, were you on the case—I'm sorry, let's back up.

When the motion for change of venue was filed, were you representing Mr. Darden?

A. Yes, sir.

Q. When it was granted, were you representing [306] Mr. Darden?

A. I can't say for sure. It was simultaneous with us being dismissed.

If I'm not mistaken, hearing for change of venue and the motion waiving counsel—the second motion that he filed waiving counsel—was at the same time. Now, I may be incorrect on that.

Q. After you were reappointed to the case, did you object to the venue having been changed and did you seek to get it returned?

A. Yes, sir. We also objected to the venue being changed, to begin with.

Q. Why was that?

A. To Mr. Darden.

Q. What was that? Whose idea was it?

A. To do what?

Q. To change venue.

A. Mr. Darden's.

Q. Why did you object?

A. I felt that we ought to at least try to see whether or not we could get a venire in Polk County to try the case, rather than to move it to God knows where.

The logistics of the situation. The fact that we were talking about location, roads, towns, that were [307] in Polk County. It may be important to be here where people were familiar with some of those places that we were talking about. I believe the suggestion was made to Mr. Darden by the Judge on a prior request for change of venue, that the proper thing to do would be to keep venue in Polk County and see if a jury couldn't be sworn and then try—if it could not be because of prejudice, then to go ahead and move for the change of venue. That was our position.

Q. Who conducted voir dire examination?

A. I believe both Mr. Maloney and I did.

Q. Was there a time when Mr. Maloney conducted it by himself? Or at least certain aspects of it?

A. How do you mean?

Q. I mean—

A. Without me present?

Q. No, not without you present. You said you both did. I mean, did he have—what, a certain number of people to examine? Or did you have other matters to take care of?

A. I don't recall. The record would show that.

A. Were you present?

A. Yes, sir.

Q. Did you listen to the questions that Mr. Maloney asked of the prospective jurors?

[308] Yes, sir.

Q. Were you satisfied that he was doing a job that should have been done?

A. Yes, sir.

Q. Did he ever inquire, after at least temporarily relinquishing a witness, whether he should ask further questions? In other words, did he miss anything.

A. You mean, did he come back to counsel table?

Q. And ask you if he missed anything?

A. I'm sure he did.

Q. And did you give him guidance?

A. If he came back, yes, sir. I'm sure he did, that's standard procedure.

Q. Did you ever direct Mr. Maloney to draw out the voir dire examination for an entire day because you hadn't had the opportunity to prepare an opening statement?

A. That's absolutely rediculous.

Q. Did you ever tell him to draw it out for the entire day?

A. I may have.

Q. For what reasons?

A. I knew that the State's first witness was going to be Mrs. Turman. And I certainly didn't want the jury going home the first day after being [309] picked and put in the box and listening to the devastating testimony that she was going to produce, and have all night to sit there and think about it, all by itself, isolated.

Q. Mr. Goodwill, did you even make an opening statement?

A. No, sir.

Q. Why not?

A. I never make an opening statement.

Q. Why is that?

A. My own personal belief is that it doesn't accomplish anything prior to the State's case. Quite frankly, I use the opening statement to argue to the jury one more time.

Q. At what point in trial?

A. Primarily before the defense puts on their case.

Q. Did Mr. Maloney cross examine any State witnesses?

A. Yes, sir.

Q. Were you present?

A. Yes, sir.

Q. You heard all questions asked?

A. Yes, sir.

Q. Once again, did he do a job good enough, in [310] your judgment?

A. Yes, sir. He did an admirable job.

Q. What kind of witnesses was he directed, permitted or asked to cross examine?

A. I believe he cross examined Edith Hill.

Q. Who was she?

A. She was a neighbor lady to the Turmans who heard the shots and saw the young boy run toward her house after he had been shot and observed the car leaving the furniture store.

Q. Did she identify Mr. Darden?

A. No.

Q. Who was another witness?

A. We also had the deposition of Mrs. Hill and a statement from her, in addition to the deposition.

Q. I'll get to that.

A. I would have to refer to the—I believe—to the petition that was filed, or the amended petition.

Q. John Daniel Stone?

A. John Daniel Stone was the man who was involved in the automobile accident with Mr. Darden, or was there at the time Mr. Darden had the accident. We had his statements. We knew exactly what his testimony was going to be. Mr. Stone was our witness.

Q. Mary Simmons.

[311] A. Mary Simmons was the lady who transported Mr. Darden back to Tampa after the accident. Again, she basically ended up being our witness.

Q. Sammy Taylor.

A. Sammy Taylor was a deputy sheriff. Particularly, I don't recall what he testified to, except he was the one who took some photographs of the scene. He may have taken some photographs of the scene of the murder and also the scene of the accident.

But, basically, all he did was identify pictures that were of the scene at the time.

Q. Eugene Mezger.

A. Eugene Mezger was the pathologist from Lakeland General Hospital. We had his pathologist report. The sum and substance of his testimony was the cause of death.

Q. You knew what all of the above witnesses were going to testify to.

A. Yes, sir.

Q. How did it come about that Mr. Maloney cross examined them?

A. Each individual one, I can't tell you specifically. There was some discussion between Mr. Maloney and I in the trial. I'm sure, when the State would call a witness I would lean over to him and say [312] something to the effect, "You go ahead and take the cross examination on this one," or whatever.

You know, we didn't lay out and say, "Okay, I'll do this one, this one, this one, and this one. And you do this one, this one, this one and this one."

Q. Did you ever spring it on him?

A. No, sir.

Q. How would you classify these witnesses in terms of ability to incriminate your client?

A. Non-probative. The only one that could possibly incriminate the client would be John Stone. John Stone, as I say, was kind of a toss-up situation where we had—we used him to show that the accident did occur as Mr. Darden said that it did.

Q. I realize that it's perhaps difficult, but can you give me an approximate number of hours you spent on this case from beginning to end?

A. Number of hours—I don't think it's even possible. I know that I spent more time on this case than I spent on—with some fear that I may be here on another one of these hearings, but I spent more time on this case than I spent on any capital case I have been involved in, probably more time than any case I've ever been involved in.

Q. How would you consider your level of interest [313] in this case?

A. My level of interest was extremely high because I was cognizant of the possibility of the result.

Q. Were you ever lackadaisical to the case or your conduct at trial?

A. I don't believe you can be lackadaisical in a capital case, a murder case.

Q. Do you recall if Mr. Darden ever had to ask you to object?

A. Again, I'm sure he's like many of the defendants that I represented before—like when something comes in, you know, he pokes you, "Object, object, object." Again, either he's going to run the trial or I am. And I'm not saying that he did, but he may have.

Q. Did you ever ignore him?

A. How do you mean "ignore him?"

Q. I don't know. Let's see what we can invent. Did you ever ignore him at trial or in preparation for trial?

A. I don't know what "ignore" means. I'm sorry.

Q. All right. We'll let it go at that.

It has been alleged that Mr. Darden smelled alcohol on your breath, and according to his testimony, twice. He did say that—that is at trial—he did say that he smelled it on many occasions before trial, [314] "during normal working hours." That however, you were not drunk, but only mildly intoxicated. Is that statement, in your opinion, true, sir?

A. No, sir. That's a lie.

Q. Did you ever drink any alcoholic beverages during the actual trial of this case? In other words, were you under the influence of any alcoholic beverages during court appearances?

A. No, sir.

Q. Did you ever drink after trial?

A. Yes, sir.

Q. Do you recall the day that, because of your absence, trial was continued for a day?

A. Yes, sir.

Q. Would it be your recollection of the facts that, prior to that day, the State had already received testimony from Mrs. Turman and from other witnesses who, as a matter of fact, I believe everybody but Weatherford and Phillip Arnold. Is that square with your recollection, roughly?

A. Yes, sir.

Q. To that point the best the State had done was offer eyewitness testimony from Mrs. Turman that Mr. Darden had committed the crime. They had presented testimony that a car was seen leaving the area at the [315] time, that a car was involved in an accident, and that Mr. Darden had been identified as being present at that accident. They had, I believe, introduced a weapon. Had that weapon ever been ballistically tied to your client?

A. I don't recall that the weapon, itself, had been introduced into evidence.

Q. At that point?

A. No, sir.

Q. All right.

A. Testimony regarding the weapon from the FBI ballistics expert had been put on the stand.

Q. All right. Let me ask you this, perhaps to be more accurate. Did your investigation indicate that the weapon could be ballistically matched to any of the bullets recovered?

A. No, sir. We had the FBI reports in our file both as to ballistics, blood tests, fingerprints—everything that the FBI checked, we had.

Q. Did your investigation reveal that the State had any fingerprint evidence that they could use?

A. No, sir, they did not.

Q. Of any kind.

A. None at all.

Q. From the store.

[316] A. The only fingerprint evidence that they had was that there was one fingerprint on the steering wheel on the vehicle and one, I believe, on a pair of glasses which were found in the vehicle, the wrecked vehicle.

Q. Whose prints were they?

A. Mr. Darden's.

Q. That didn't bother you: did it?

A. No.

Q. All right.

We admitted that he was in the car.

Q. I show you Petitioner's Exhibit No. 19, a report from the Sheriff's Office of Polk County, Florida, signed by Dan Weatherford.

Had you ever seen that prior to trial?

A. Yes, sir.

Q. Do you have an idea, approximately, how far in advance of trial that you saw that?

A. Almost immediately after I became involved.

Q. Almost from immediately after.

A. This diagram haunted me from the time I started.

Q. In what way? How does that report—if you would, please, describe it for the Court for purposes of the record. What does that diagram represent?

[317] A. You want me to show this to Judge Game, or—

Q. No, sir, I believe a verbal description will do.

A. All right. What this portrays is the placement of the cartridges in the cylinder of the gun, which was found approximately thirty feet from the automobile that Mr. Darden wrecked, at the time that Deputy Sheriff Weatherford picked it up and opened the cylinder.

The testimony later revealed that he was most careful in opening the cylinder as to not disturb the rotation of the cartridges contained therein.

Being somewhat familiar with guns, I knew that this gun had a left rotation. In other words, when you pulled the trigger, you had a left rotation of the cylinder.

The testimony derived from Mrs. Turman and Phillip Arnold, as to sequence, was as follows:

She testified that the first shot killed her husband. Phillip Arnold then came on the scene, looked up, and the gun was in his face, the trigger was pulled, and there was a click. The trigger was pulled again and he was shot in the mouth. The trigger was pulled again, as he was rising, and he was shot in the back of the neck, and then as he was running, he was shot the third time, in the back, and that's all of [318] the testimony regarding the shots fired.

Mr. McDaniel later vividly showed in Court, it was a bang, click, bang, bang, bang.

What this diagram shows is that there was a fired cartridge in this location. (Indicating)

Q. Use the hands of the clock if you would.

A. All right. Okay. There was a fired cartridge in the four o'clock position. There was an empty chamber in the six o'clock position. There was a fired cartridge in the eight o'clock position. There was a fired cartridge in the ten o'clock position. A fired cartridge under the firing pin. And a live round in the two o'clock position for the last bullet.

Q. What did this mean to you?

A. I meant that circumstantially that the gun which was found in the immediate vicinity of Mr. Darden's car, while not being able to be linked ballistically or through fingerprints, could be linked on the basis of the cylinder sequence.

Q. Prior to or during trial, had you had any either formal or informal discussions with Mr. McDaniel or Mr. White, the prosecutors?

A. In reference to what?

Q. The case.

A. To this case?

[319] Q. Yes, sir.

A. Oh, I'm sure we did, yes.

Q. From those discussions, did you get any idea that that particular piece of evidence, which you stated earlier haunted you—whether they intended to use that? I mean, did you know for a fact that it was coming in?

A. No, sir. There was never the first indication that they knew about it, and if they didn't, I wasn't going to tell them. This was hidden back—I say hidden, it was down in their file along with a bunch of other reports. It had not been pulled to the surface, there wasn't anything out of the ordinary that had been pulled, and as I say, I certainly wasn't going to tell them about it if they hadn't picked up the seriousness of that piece of evidence.

Q. Did there come a point in trial that you decided that it was necessary to learn whether they were going to use it?

A. I told Mr. Maloney from the time we arrived in Inverness, that it was absolutely imperative that we know it.

Q. What did you do, if anything, to determine whether they were going to use it—and I'm referring to the night before the continuance?

[320] A. Okay. After the trial, after we got back to Iverness, I went to the bar in the hotel where we were staying.

Q. Where were you staying, by the way?

A. I can't remember the name of it.

Q. What city? Was it Iverness?

A. No, sir, it was in Homasassa Springs.

Q. Homosassa Springs?

A. Yes, sir—Homosassa, I don't think it was Springs.

And quite frankly I began to pump Dan Weatherford.

Q. Who is Dan Weatherford?

A. The investigator that had drawn that diagram.

Q. And what do you mean, "began to pump him?"

A. I made up my mind that I was going to find out whether they knew about that cylinder or not, because if they did, if they were going to use it, I felt like we had some very serious problems as far as a conviction was concerned.

If they did not come in with that, it was my impression that we at least had a horse race on the basis of identification of a very distraught woman and a boy who had been shot three times.

And basically, we had nothing except that [321] I could complain a whole lot about the Sheriff's Department not taking fingerprints or ballistic tests or paraffin tests or tire tracks or innumerable things, I probably definitely had a horse race. If that was coming in, I'm not sure what I was going to do, but I knew we had to do something.

Q. All right, sir. Please continue.

A. I proceeded through the evening to find out from them, in fact, that they did know about it, that they were aware of it,

and certain bullets were painted red and others yellow. It was going to be a very graphic demonstration for the jury.

Q. You determined that they knew about it and that they were going to use it.

A. Yes, sir. Yes, sir.

Q. And you determined this in the course of what period of time and under what conditions?

A. Oh, I would say from probably 8:30, 9:00 o'clock until midnight.

Q. Did you have supper?

A. I had supper prior to that.

Q. How many people were you with?

A. As I recall, there was Weatherford, possibly Herbert Goodson, who is a deputy sheriff. There may have been another deputy sheriff there, I don't recall [322] exactly who was there.

I was primarily concerned with Weatherford and no one else. This was a big bar, you know, with people coming in and out.

Q. Motel bar?

A. Yes.

Q. In Homosassa, Florida?

A. Yes.

Q. Is that a large town, by the way?

A. Not that I saw.

Q. Would you consider it small?

A. Yes, sir.

Q. Okay. What happened after you discovered what you didn't want to discover?

A. To the best of my recollection, I went to the room somewhere between 12:00 and 12:30, somewhere in that neigh-

borhood. Mr. Maloney was already in bed asleep, as was his practice the whole time we were there.

I believe I awakened him and told him they were aware of the gun. I had tried to emphasize upon him for three days the devastating chain which I felt this could create, apparently without success.

I told him that they knew about the gun, and we had to come up with something, and could he help me go through the file or something. I was really at [323] somewhat of a loss as to exactly which direction to go then, but I wanted some help.

Q. What was his response?

A. He was asleep and he wasn't going to help me.

Q. And what happened then—did he go back to sleep? What did you do?

A. I proceeded to go through the file.

Q. For how long?

A. Two, three hours, maybe.

Q. Did you go to sleep that night?

A. Yes, sir, as I recall it, I fell asleep there on the table where I had the file spread out.

Q. How many drinks had you had?

A. Several. Five, four, five, six maybe.

Q. Had you ever had that many before in your life?

A. Yes, sir.

Q. Do several drinks make you highly intoxicated?

A. Not highly intoxicated; I'm sure that I was somewhat intoxicated. I will not deny that. It's hard to describe in a situation out of context, when you're sitting there with some deputy sheriffs who have one design in mind—

Q. Which is—

A. To convict your client. I mean, you can't just [324] sit there and sort of crawl over in the corner and say, "No, I'm not going to drink, boys. Tell me about the gun."

I mean you kind of have to get into the swing of things with them and be among them.

Q. One of the boys?

A. Sure.

Q. All right. You fell asleep at the table after two or three hours, until—what time would that put you, approximately, asleep?

A. I can't tell you exactly.

Q. What happened the next morning?

A. I was awakened by Mr. Maloney leaving the room, the door slamming to the room.

Q. Did he awaken you?

A. No, sir.

Q. Or did the door awaken you?

A. The door woke me.

Q. What time was this, approximately? Do you remember?

A. I believe it was about eight o'clock.

Q. What did you do then?

A. I got up and got dressed. I had a severe headache. I don't acquaint it with the alcohol intake. I'm prone to migraine headaches. I took some medicine [325] for that, and laid down and waited until nine o'clock.

I had pretty well formulated in my mind that the primary thing we had to do, as far as a defense move at that point in time, was to get the psychiatric evaluation by a private psychiatrist, which we had been trying to get for some long period of time.

Q. We'll get back to that in a minute. Did you at some time finally go to court?

A. Yes, sir. I called Mr. Maloney prior to court starting and told him that I had some things to do. I knew that Dr. Mezger was the first witness—to go ahead and take Dr. Mezger, and that I would be there as soon as possible. But I did not feel well, I had taken some medicine, and I would be there.

I went to Inverness. One of the bailiffs or deputies, I can't recall, indicated when I got there they had just recessed and they had just walked out of the courtroom when I got there.

Q. For the day?

A. Yes, for the continuance that day.

Q. Okay.

A. I turned around and went back to Inverness—this would have been probably eleven o'clock by the time I got back over there, I guess—I went to see Judge Dewell.

[326] Q. What about?

A. I knew that he would want to see me.

Q. Why did you think that?

A. I think it had been indicated to me that he wanted to talk to me. He apparently had it conveyed to him by one of the deputies that had been present the night before, that I had been out with them and pumping them for information.

Q. What did the Judge have to say to you?

A. He chewed me out for what he thought was possibly unethical conduct, told me he was not going to have any error in his trial if he could prevent it, and that to avoid any possibility of error, that he went ahead and continued the case for the day.

He was aware that I had been there, that I had just returned from Inverness. Prior to the time that I went to Inverness I

talked to the psychiatrist's office in Tampa, in order to see if we could get Mr. Darden in to see him that day.

As I say, when I went to Inverness that day, it was for the full intentions of arranging for that psychiatric examination.

Q. You mean you had intended to do that all along irrespective of what transpired the night before?

A. Well, you see, he was supposed to have been [327] examined prior to trial, a couple days prior to trial.

Now, back up a little bit on the psychiatric—almost immediately after I was put on the case, I wanted an independent psychiatric and psychological examination done on Mr. Darden, not by the doctors at the Polk County Hospital, but by private physicians and psychologists.

My initial efforts in that were thwarted by Mr. Darden, because he said the defense is not sanity—"I'm innocent, I don't want a mental evaluation."

It was brought up again at another hearing sometime around November—I believe it was November 7, the record indicates it, the transcript shows it—that I again was after a psychiatric examination.

At that time it was explained to Mr. Darden, in court, that the psychiatric and psychological could be used for something other than an insanity defense—sentencing, possibly in defense, whatever.

My understanding from reading the transcript is that he pretty much went along with that being done. But there was no definite date set as to when that would be done.

The chain of events came along December—it was the end of December—we were dismissed from the [328] case, we got back on it six days before trial. The psychiatric and psychological evaluation still had not been done.

I went to Judge Dewell and said, "I want it done," and he said, "Okay, arrange it."

It was arranged for, I believe, the Saturday before trial was to start, or the Monday before, but immediately before trial.

Through a mixup with the deputy sheriffs he was not delivered to the right place, or the doctors were at one place and he was somewhere else; otherwise, it was not done. I was very concerned about getting this done, and after the testimony became apparent to me—about the gun—it became more of an impetus to me to have it done.

So when I went to Inverness that morning, it was with the distinct idea that, "Judge, we need to have this thing done. You have to go ahead and continue trial"—I didn't know it had been continued at that point—and told Judge Dewell that I had already contacted the office with the idea of trying to get it done.

Q. Did Judge Dewell—to use your words—chew you out about drinking?

A. No sir.

[329] Q. What about pumping a witness?

A. He chewed me out about pumping the witness and being late and causing the continuance, but not about the other, no sir.

Q. Do you recall coming into your motel at four a.m.?

A. No, sir.

Q. Do you recall having some sort of an argument or fight with Mr. Maloney?

A. Well, that's subject to some definition. I think that I was not too happy when I came in and asked him for some help and I didn't get it, but that was somewhat a familiar pattern.

Q. If Judge Maloney had testified that it was four a.m., would he be mistaken?

A. Yes, sir.

Q. At that time do you know of any place in Homosassa, Florida, that you could have stayed out until 3:30; 4:00 a.m.?

A. No, sir.

Q. This is a weekday, as best you recall?

A. It was a Wednesday night.

Q. In your experience in handling capital cases, during voir dire examination of the jury, do you much care whether you find it out if the juror is irrevocably [330] committed against capital punishment?

A. Do I care?

Q. Do you care if you're the one that finds out?

A. No.

Q. Who generally finds that or establishes that?

A. That the individually is opposed?

Q. Violently opposed.

A. Violently opposed to capital punishment?

Q. Enough to excuse him for cause under Witherspoon.

A. Why would I excuse a man who's opposed to capital punishment?

Q. Thank you.

All right. After you agreed—the three of you—Mr. Maloney, yourself and Mr. Darden—that the only defense that would be presented would be the testimony of the defendant, himself, and that was concluded, do you recall the closing argument?

A. Yes, sir.

Q. Now, because of your tactics, you had last closing argument; is that right?

A. Yes, sir.

Q. Is it correct that Mr. Maloney had the very first closing argument—

A. Yes, sir.

[331] Q. —that was presented.

A. Yes, sir.

Q. When did he know that he was going to have closing argument?

A. I can't tell you exactly.

Q. Spur of the moment?

A. No, sir.

Q. At least sometime in advance?

A. If I'm not mistaken, I think we discussed the fact that he would take the opening phase of closing the day before.

Q. The day before.

A. Uh-huh (indicating affirmative).

Q. What was the opening day or the first half of the closing argument to consist of, generally? Do you remember, or did you establish it?

A. The whole closing argument was predicated on one thing—that was lack of evidence.

Q. Okay. Now, do you recall that the next person to present closing argument was one Mr. White?

A. Yes, sir.

Q. Do you recall who Mr. White was—other than a prosecutor? Was he to Mr. McDaniel as Mr. Maloney was to you?

A. Yes, sir.

[332] Q. An interne?

A. Mr. Maloney was not an interne.

Q. Not at that time, but perhaps was Mr. White on equal footing?

A. He had been practicing a short time. He certainly wasn't as experienced as Mr. McDaniel, no, sir.

Q. All right. Then, after Mr. White presented his argument—under the rules that you've described today—Mr. McDaniel has a shot at the jury; is that not correct?

A. Yes, sir.

Q. Do you recall what is now Mr. McDaniel's infamous closing argument?

A. Yes, sir.

Q. Did you know Mr. McDaniel prior to trial?

A. Yes, sir.

Q. How long and under what circumstances?

A. I had gone to law school with Mr. McDaniel.

Q. Where was that?

A. University of Florida.

Q. Had you maintained contact with him after law school?

A. Yes, sir.

Q. Are you both from the same area?

[333] A. Yes. Not originally, but after law school he practiced in Lake Alfred and I was in Winter Haven.

Q. So you knew him for at least the eight years prior to trial and the three years of law school.

Q. Yes, sir.

Q. Did you know him fairly well?

A. Yes, sir.

Q. Remembering that part of his argument—any part of his argument—where he began what I have admitted many times to many courts, an unnecessary tirade, do you recall Mr. Maloney doing anything which may have led you to believe that he was about to object to the argument?

A. Yes, sir.

Q. Can you possibly remember the statement which perhaps caused him to want to object?

A. No, sir. It was very early in the argument. It was very early in Mr. McDaniel's argument.

Q. How did you know that Mr. Maloney was about to object?

A. It was one of those things where he looked and said nothing to me, but he rose up out of his chair halfway. I reached over and pulled him down.

Q. Why?

A. Because I didn't want him to object.

[334] Q. Why?

A. Because I wanted to let Mr. McDaniel go on.

Q. Why?

A. Because I felt he would get much more vehement in his remarks if you allowed him to go on, and we could always come back in with an objection later on in order to preserve it for the appeal purposes.

Q. In other words, because of your knowledge of Mr. McDaniel on a personal relationship, it was your decision to let him go?

A. It was my decision to stop Mr. Maloney from objecting to it.

Q. Why?

A. For just what I—

Q. If he had objected, what do you think would have happened?

A. The same thing that happened when he did ultimately object.—The argument ended.

Q. Exactly.

A. If you will look at the record, you will note that at the time Mr. Maloney finally made his objection, after that point which was—there was not a sustaining to the motion, Mr. McDaniel did not continue his tirade past that point.

Q. Why did you let Mr. Maloney object when he [335] finally did?

A. Preserved it for the record.

Q. Then you felt it was time?

A. Yes, sir.

Q. Why would you want to preserve the record?

A. Number one, you start a capital case from the idea of two approaches. Number one, is to certainly preserve error for appeal. Secondly, is also to win it then and there if you can. I think it became apparent when some of the testimony came in that there was a fairly great amount of testimony which was incriminating.

If we caught a verdict in our favor, it would not have matter what his argument was. If we did not get a verdict, then I think that the argument, had it gone further than it did, it probably would have been reversible error without objection, and certainly with objection. I think this was borne out somewhat by the Florida Supreme Court. At least two of the Justices believed that it was reversible.

Q. When you say "reversible," does that mean that your client gets a new trial?

A. Yes, sir.

Q. Is that something, if all else fails, something to be looked forward to from a defense standpoint?

[336] A. I don't know of a defense lawyer that—delay seems to be almost every defense lawyer's middle name.

Q. I don't work that side of the street, but could you explain why?

A. I think most of them feel that if you can keep delaying and delaying and delaying, that the passage of time certainly helps the situation.

Q. Witness memory?

A. Witnesses memories get vague, witnesses die, things may happen, in between that may have some bearing.

Q. Mr. Maloney, Judge Maloney, testified that in his professional opinion the defense of Willie Jasper Darden was shocking and one of the poorest run trials he has ever seen. What is your opinion of Mr.—let's back up a bit—what is your opinion of Number One, the quality and the extent of the State's case and the defense you were able to come up with and the degree of effectiveness of representation, in that order?

Q. The strength of the State's case?

Q. Yes, sir.

A. Extremely strong. Extremely strong if you could link it with the evidence I indicated.

Q. But they had no fingerprint evidence.

A. No.

[337] Q. And nobody really put him at the scene of the crime.

A. But you had two i.d.'s.

A. With the—well, you mean with the exception of those?

Q. No, I'm sorry. Those people who you earlier described; one, the distraught lady.

A. Right.

Q. And the other, the boy who had been shot three times.

A. Right. But you do have two i.d.'s placing him at the scene.

Q. All right. But eliminate those and you have no other physical evidence with the exception of the gun; circumstantially.

A. An accident three miles away.

Q. Was the case fully investigated and developed by the Public Defender's office?

A. As far as I'm concerned, it was, yes, sir.

Q. Can you think of anything you failed to do?

A. No, sir.

Q. Is there something today you would do differently?

A. Based on the rules that we had to go by at that [338] time—particularly talking about the mitigation situation on sentencing—I don't know of anything that I would do any differently than I did.

Q. I assume that you're referring to today existing petitional law is that the trial court may receive all relevant evidence in mitigation, regardless of the fact that they may not be listed in the statutes; is that correct?

A. Yes, sir.

Q. Either today or then, could you think of any relevant evidence that you could have presented on behalf of Mr. Darden, in mitigation?

A. No, sir.

Are you aware that the court found two elements in mitigation?

A. No, sir.

Q. It might refresh your memory that even though it wasn't presented and you could think of none, apparently the trial court felt it was relevant the fact that he was the father of seven and that he had repeatedly professed his innocence.

A. Well, okay. Yes, if you're talking about mitigations per statute.

Q. Yes, sir, or anything in mitigation.

A. Oh, okay. I thought you were referring to [339] two mitigating factors per statute.

Q. No, sir.

A. Yes, that was mentioned.

Q. With or without—

A. That was mentioned, but that's not statutory.

Q. Right. Exactly. Can you think of any relavant evidence, non-statutory, that you could have presented then, or even today that you can think of, you could have presented?

Q. No, sir.

Q. Can you give me any idea why you think Judge Maloney would make the statement he's made under oath to the effect that the preparation was atrocious?

A. You've placed me in somewhat of a difficult position. I indicated to Mr. Harper sometime back that I felt that Mr. Maloney had done a superb job in those portions of that trial that he was asked to do.

The only thing I know of that would temper it would be an almost moralistic view on his part being in opposition to capital punishment.

MR. PROSPECT: Thank you, Mr. Goodwill. Your Honor, I have no further questions at this time.

THE COURT: All right. At this time we will take a recess. We'll come back at three [340] o'clock.)

(Recess, 1:55 p.m. to 3:00 o'clock p.m.)

MR. HARPER: May it please the Court--

THE COURT: You may inquire.

CROSS EXAMINATION

BY MR. HARPER:

Q. Mr. Goodwill, at the point of Mr. Darden's trial, how many capital cases had you actually tried?

A. I believe three or four had actually gone to trial.

Q. Okay. The comment you made about the file which you had from the Public Defender's office—about the things missing—did you make a copy of the file before you sent the original off?

A. I can't answer that. I don't know. It was sent off by the office.

Q. You didn't cause a copy of it to be made?

A. Not personally, no, sir.

Q. Do you know the actual day that you first appeared on behalf of Willie Darden?

A. You mean a court hearing?

Q. Well, actually either in the way of a court appearance or causing a pleading to be filed on his behalf, or whatever point you were formally assigned to the case.

[341] A. Well, there wasn't any formal assignment, you know, in the form of a memo or anything like that that I would have.

I believe that it was October 31st, 1973, that I filed anything on his behalf. We filed motions to compel, motion in order to allow defendant to retrace steps, and I took three depositions on that date. That's what the court file indicates was the first activity as far as court filing is concerned.

Q. You're referring to some notes there—your notes you took from the court file?

A. Yes, sir.

Q. When did you take those notes?

A. I guess two weeks ago.

Q. Okay. And you used the notes to refresh your memory at this point? May I look at those?

A. Sure. What I did was just begin at Volume I of the court file and just make notes of pertinent dates that certain things were done.

Q. Thank you. Okay, the first thing you filed, Mr. Goodwill, you indicated was a motion to compel. What was that?

A. I believe this motion was filed as a result of a prior response for discovery in which I alleged that there was certain other information that I felt [342] that the State had knowledge of.

Q. Would this be in the way of a motion to compel further discovery?

A. Well, yes. This was in the nature of a motion to compel the State to turn over to me, specifically the name and address of the lady who took the defendant to Tampa, the names and addresses of the witnesses to the automobile accident and the photos used for the out-of-court i.d. by Ms. Turman and Mr. Arnold, if any.

Q. So these were pretty strick discovery procedures utilized then; is that right?

Q. Yes, sir, I think it was.

Q. Okay. This was sort of contravening this blanket discovery and routine discovery that was normally practiced in that circuit; is that right?

A. Yes, sir.

Q. Okay. A person in custody would have a hard time availing themselves to this informal routine of discovery utilized between the State's Attorney's office and the Public Defender's office; would they not?

A. Yes, sir.

Q. Virtually impossible.

A. It would be under normal circumstances. However, I believe that our file indicates that he was [343]—that Mr. Darden was given copies of everything in our file which contained things that we obtained from the State Attorney's file.

Q. In that sense you were a conduit. If he did not have such a conduit he would—or any person in his shoes would not have access to that information; is that right?

A. No, I presume that would be correct.

Q. Okay. And you at one point in direct examination you indicated the case to be extremely complicated and indicated something to that effect around the time of reappointment on January 9th, 1974; do you recall that?

A. That the case would be complicated?

Q. Yes.

A. Yes.

Q. Okay. And it was in fact your fair appraisal that the case was complicated?

A. Yes, sir. I think that would be fair.

Q. At any point after your reappointment on January 9, 1974, did you file a motion to continue the case?

A. I don't recall whether a motion to continue was filed. I do know that at that point we filed a motion to change venue back to Polk County.

[344] Excuse me for just a second. I'll try to refresh my recollection from here.

No, sir, unless it was incorporated in some of the language for the motion for change of venue, we did not file a separate motion for continuance.

Q. Okay. Now, the case, at least at that point, was not complete with the psychiatric exam which you had been seeking for some time; is that correct?

A. Yes, sir, that's correct.

Q. Did you bring that matter to the court's attention, pretrial?

A. Yes, sir.

Q. I what way?

A. I believe I brought it to him, to Judge Dewell, in an informal fashion by going to him in his office or his chambers and making him aware of the fact that the psychiatric examination which I had been requesting for some time had not been done.

Of course, we did have a lapse of time in there when Mr. Darden was representing himself. And based on my oral communication with Judge Dewell, he entered an order on the 10th of January to deliver the defendant for psychiatric examination.

Q. Okay. Was that an ex parte hearing?

A. I believe not only ex parte from the standpoint [345] that Mr. Darden may not have been present, but it was also ex parte from the standpoint that the State probably was not even present.

Q. That was that I was referring to, even more than Mr. Darden.

And through some problem with the deputy sheriffs that court ordered evaluation did not take place; is that correct?

A. Yes, sir.

Q. And it was not until the third day of the trial that you called that to the Judge's attention?

A. No, sir, the Judge was aware that it had not taken place.

Q. Did you move to continue the case prior to trial so that the psychiatric evaluation could be completed?

A. No, sir, I did not.

Q. Mr. Goodwill, I deliver to you what is respectfully Exhibits 1 through 23 on behalf of the petitioner, and ask you to momentarily familiarize yourself with those.

(Witness examines documents(

A. All right.

Q. Are those documents familiar to you?

A. Pardon?

[346] Q. Have you ever seen those before?—Before right now?

A. Yes, sir.

Q. Are they familiar to you as either discovery or work product of the Public Defender's file in the case of State vs. Darden?

A. Yes, sir, all that—all but one which is Petitioner's Exhibit No. 21.

Q. What is No. 21? Do you recognize it?

A. It's my impression that it's notes made by someone in Mr. Gardner's office, who handled the appeal. It may have been

the result of a conversation he had with me subsequent to the trial, relative to the appeal.

Q. Do you recall the Sheriff's Office exhibits, specifically—13, 14, 15, 17, 18 and 20, as referring to the call regarding the Turman homicide received at 1831 hours, 6:31 p.m., on the right of 8 September 1973?

A. Yes, sir.

Q. And that call, according to these reports—do you recall that being initiated by Mrs. Turman herself?

A. I cannot say that for a fact, that that was by Mrs. Turman. I had a conversation with Mr. Koehler of the Sheriff's Department, who received the call—in [347] trying to verify the time and things of all this sort, and honestly, I don't recall whether he told me it was Ms. Turman or if it was the operator that had placed the call.

Q. Okay. Do you recall Ms. Turman saying that she initiated the call, either through the operator or directly herself, while the assailant was chasing Phillip Arnold?

A. I recall that shortly after Phillip Arnold left the premises that she placed the call; first, to the Sheriff's Department and then to her pastor and then her sister.

Q. Okay. So when you say, "when Phillip Arnold left the premises, "you're talking about the immediate vicinity of the store?

A. Yes, sir.

Q. And he may have still been in the general area, but he wasn't right around the store when she initiated the call.

Q. He was no longer at the back door, and neither was the assailant at that point in the store.

Q. Okay. And you indicated that this exhibit 12, Sheriff's Report or Highway Patrol Report—whichever it is—the acci-

dent report, that's what it's referred to, showed that the accident was at 6:35 p.m.; is that [348] correct?

A. Yes, sir.

Q. And what was the citation on the second page of that document—what was the offenses cited in the accident report?

A. Willful and wanton reckless driving—I believe it says leaving the scene.

Q. So one would infer that at least by 6:35 p.m. Mr. Darden had departed the scene of the accident, from that accident report; is that correct?

A. No, sir.

Q. Okay.

A. And you asked what time the accident occurred, and that indicates 6:35 and it indicates the trooper arrived shortly after seven, and that Mr. Darden was gone at that time.

Q. Okay. I've gotten ahead of myself. I show you Petitioner's Exhibit 24. Do you recognize the handwriting and the signature?

A. I don't recognize the handwriting, but it's signed J. Hill and, I assume, is Jim Hill of our office.

Q. Okay. And the second notation is about what—the second entry there?

A. The second entry is a result of a contact Mr. Hill had with the Hillsborough County Sheriff's Office [349] that they had received at 1832 hours on 9-8-73 from a person named Glen calling from the area of the Lakeland Lounge advising them of an auto accident on the New Tampa Highway.

Q. Okay. "They" being the Hillsborough County Sheriff's Office?

A. Yes, sir.

Q. Who from the Hillsborough County Sheriff's Office received that call?

A. I can't tell you. I assume that was information obtained from the radio.

Q. Okay.

A. Communications office.

Q. Okay. Did you investigate and find out who received that call in the Hillsborough County Sheriff's Office?

A. No, sir, not other than our investigator's report on it.

Q. Okay. Did you ever find out who Glen was?

A. They didn't know Glen. It was from somebody named Glen.

Q. Okay. Did you go to the Lakeland Lounge and investigate and find out who Glen was—there?

A. Did I, personally? No, sir.

Q. Okay. Did anybody under your supervision?

[350] A. Not to my knowledge.

Q. Okay. And that could be something that could be done in the case; isn't that correct, Mr. Goodwill?

A. Certainly.

Q. Do you know if Glen was a white man or a black man?

A. No, sir.

Q. But it's obvious that he reported an accident at 6:32 one minute after the—or at least an accident had been reported one minute after Mrs. Turman's call had been received; is that correct?

A. Yes, sir.

Q. And you indicated in your testimony—excuse me—

I show you Petitioner's Exhibit No. 19, which you testified to at length. What's on that diagram, Mr. Goodwill?

A. What's on here?

Q. Yes. In other words, you testified—go ahead.

A. The page is divided in half. The top appears to be-well, it's entitled "Location of 38 caliber Smith and Wesson Revolver, Serial No. so-and-so," was found—appears to be the diagram of a road, Highway 92.

[351] Q. What's the bottom half?

A. The diagram of the cylinder sequence.

Q. You testified at length on direct about Exhibit No. 19 when, in fact, it's actually two parts to the exhibit. You testified only to the gun sequence, but the top part has a map of some sort or diagram of similar import; is that correct?

A. It has a map on it.

Q. And that map indicates a distance from the scene of the crime to the scene of the accident; does it not?

A. I believe it does.

Q. Okay. Handing you Exhibit 19, I ask you does the top half of the diagram in fact depict a distance from the scene of the crime to the scene of the accident?

A. Yes, sir.

Q. And what is that distance?

A. Well, it's three miles and two-tenths of a mile from the Turmans to the Hillsborough County-Polk County Line, and it's two-tenths of a mile from the county line to the Lakeland Cocktail Lounge. But as to specifics, it doesn't show the distance to the accident, itself, it shows it to the Lounge. It would be approximately across the street from the Lakeland Lounge.

[352] Q. So this Exhibit No. 19 from the Public Defender's file would indicate that it's approximately three and four-tenths

miles from the scene of the crime to the scene of the automobile accident; is that correct?

A. Yes, sir.

Q. And these time sequences that have been reported to the respective sheriff's offices, the Hillsborough County Sheriff's Office and Polk County Sheriff's Office, would be but a minute's difference; is that correct?

A. Yes, sir.

Q. Is it not then entirely possible and probable that at the time of the assault on Mr. Turman and Mrs. Turman and Mr. Arnold, that Mr. Darden was in fact in an automobile accident that was in progress?

A. I believe that the—the time sequence is very close, yes.

Q. Okay. Now—

A. If I might look at the deposition of Ms. Turman, I believe that's where the problem lies as far as the time is concerned. Because she was not exactly definite as exactly when she called the police. It was sometime subsequent to the assailant leaving. She could not pinpoint exactly how much time, but it was not a long time.

[353] Q. Go ahead and review what you would like to review.

A. Our file—we don't have the deposition of Ms. Turman in our file. Mr. Johnson may have it or the Attorney General may have it, but we don't have it in the file which was given to us.

Q. I show you what has been respectively marked as Petitioner's Exhibits 18 and 19, Mr. Goodwill. All right. Referring to each of those, can you tell when Ms. Turman indicated she either initiated or caused to be initiated a call to the Sheriff's Office of Polk County?

A. This indicates that Ms. Turman got up off the floor and saw Phillip running to the south down the driveway. The col-

ored subject ran after Phillip. Ms. Turman at this time left the rear door area to go to the phone and call for help, this being the telephone operator.

Q. Okay. So she would have actually called the operator, and apparently immediately, while something was still going on, apparently; is that correct?

A. All I can tell you is what this report says.

Q. Okay. What report are you referring to?

A. Petitioner's Exhibit No. 18.

Q. Okay. Refer to 19, please. [354] (Witness examines document)

A. Yes, sir. What about it?

Q. Do you have any reference there to when the call was made?

A. Yes, there is.

Q. What does it say?

A. Well, the question is asked, "How many shots were fired; do you know?"

"Answer. One at my husband, two at Phillip at the back door, and I don't know how many after they left here, because I came back inside, dialed the operator, gave my address and told them there was a shooting and a holdup and for her to please call the Sheriff's Office."

Q. Of your investigation, do you know how many shots were subsequently fired?

A. Subsequently, to the two she's talking about?

Q. Right.

A. One.

Q. Okay. Then you indicated on direct examination that it was not possible to investigate every detail, or at least you told

Mr. Darden that it was not possible to investigate every detail. Is that because of the extreme complexity of this case?

A. Did I testify that it was not possible to [355] investigate every detail, or everything he wanted us to investigate?

Q. Well, I have it in my notes that you indicated that you didn't investigate every detail. My question is, is that because of limitations on your time and budget by virtue of the complications of the case?

A. No, sir. I think what I would have meant by that is that it was not possible to investigate every detail that he wished us to investigate, whether it was relevant or not relevant.

Q. Okay. Now, on the day you missed the trial, Mr. Maloney undertook the examination of Dr. Megzer.

A. Yes, sir.

Q. Is that the way you pronounce it?

A. Mezger.

Q. Mezger. You were not present, of course, when that started; is that correct?

A. That is correct.

Q. As a matter of fact, you were not present during the entire examination of Dr. Mezger.

A. No, sir, I was not. And I did err on direct in that respect.

Q. Okay. This was, then, Mr. Maloney's first capital case; is that correct?

A. Yes, sir.

[356] Q. And the doctor was in fact testifying to an essential element of the crime, namely, the criminal cause of death; is that correct?

A. Yes, sir.

Q. And in fact—have you reviewed the record of Mr. Maloney's examination of Dr. Mezger?

A. No, sir, I have not seen the record.

Q. Okay. By that you mean you haven't read the record.

A. I have not seen the record.

Q. You mean the transcript of the trial proceedings.

A. Correct.

Q. Okay. Now, also scheduled in the orderly procedure of that trail would have been such witnesses as Dan Weatherford, Phillip Arnold and other witnesses who were actually called the preceding day; isn't that correct, Mr. Goodwill?

A. Correct.

Q. And in the normal course of trial proceedings on that Wednesday there would have been at least one eyewitness and one witness—namely, Mr. Weatherford—of some critical import to your case.

A. That was not my information at that time—that they were going to be called at that time.

[357] Q. Okay. Well, those people were in fact called the next succeeding day, is that right?

A. In fact, there were several that, as I recall, were indicated that would be called, were not in fact called—that were to be called that day.

Q. Okay. But you knew also that those witnesses had not been called, at least, and were going to be called sometime.

A. Yes, sir.

Q. Okay. And, of course, it's the ultimate and absolute discretion of the State in what order to call whatever their witnesses are; is that not right?

A. Yes, sir, that's true.

Q. And you had no court order or any written report of any order which the State was going to abide by in the course of the presentation of its witnesses in the Darden case; is that right?

A. I have no guarantees, but I certainly had assurance from the State as to the order in which they were going to call witnesses. In fact, if I'm not mistaken, there were certain conferences, perhaps not during the trial, itself—between Mr. McDaniel, myself and the Court, as to try to get some idea as to what the general layout of the trial would be.

Q. Mr. Goodwill, despite all popular belief to [358] the contrary, I'm not here trying to embarrass you or personally assault you, nor am I bringing a generalized attack on the Public Defender's office of the Tenth Judicial Circuit.

I am, however, concerned with the totality of the representation of the State vs. Willie Darden and functions of the defense accordingly. And with that in mind, I must ask your indulgence to possibly ask you some compromising or embarrassing questions. But that is my purpose, only.

Namely, is it a fact that you basically had a hangover and couldn't come to court the next day; is that a fair way to categorize it?

A. No, sir, I don't believe I did.

Q. Okay. What would you say is a fair way?

A. I previously testified that I had a migraine headache, which I am prone to get. They are the type of thing that if you don't get hold of very early, they can last up to three or four days.

There is a difference between a hangover headache and a migraine headache—spots before the eyes and that sort of thing—it's fairly indicative of it.

Q. Okay. Migraine being one that will knock you down and out for a while.

[359] A. Yes, sir—

Q. But even—excuse me.

A. —fairly much. I mean, if it's not caught fairly early, yes.

Q. Okay. But even so, you were able to arrange for psychiatric appointments for Mr. Darden.

A. That's a matter of being on the telephone.

Q. Okay. And there was no way for you to arrange that prior to the trial?

A. It was arranged prior to trial.

Q. Well, there was no way for you to arrange it and carry it out prior to trial.

A. Mr Darden was to have a psychiatric examination prior to trial, and until I arrived in Inverness I was not aware that he had not received it.

Q. So until you actually started trial, you did not realize that Mr. Darden had not received a court ordered psychiatric examination.

A. That is correct.

Q. And you did not move to continue the proceedings until it was completed?

A. No, sir, I did not.

Q. But in the course of the middle of the trial, after you learned Mr. Weatherford had sandbagged you on this gun sequence, you intended then to get a continuance [360] in the middle of the trial in order to complete a court-ordered psychiatric exam.

A. No, sir. We—there had been no question that we were to have, or were going to have this at some point. The Judge discussed it with me and with the State—there would be a psychiatric exam.

Q. Are any of those discussions a matter of record?

A. I would say no, sir. I don't know if they are or not. They may be in the record.

Q. Were any of those discussions in the presence of counsel for the State, counsel for the defendant and the defendant, Willie Darden?

A. I truthfully can't recall whether they were or not.

If I may elaborate just a little bit. There was never any question, and I think the record will show that as early as the 1st of November I was extremely concerned with the psychiatric and psychological evaluation for Mr. Darden for whatever purpose that it might serve.

The delay in December caused by Mr. Darden, in essence, firing the Public Defender's office—

Q. That was December 27th; right?

A. That was December 27th.

[361] Q. Through January 9th.

A. Through January 9th. To that point, there had been no decision about it. However, prior to December 27th, he had filed a motion to waive us. After that I again got Judge Dewell to go along with it.

It was my position that even though he was an indigent defendant, that he was entitled to the same rights as a fee paying defendant and could have independent psychiatric and psychological evaluation for whatever purposes it may serve.

Judge Mars, who I believe initially took up that issue, was not convinced that he necessarily was entitled to it. However, later on they did indicate—there was some transcript I saw yesterday of a hearing, I believe, around the early part of November which indicated that he felt that it would be possible.

It was planned. I never gave up the idea of having that psychiatric examination. There were discussions between

myself and the judge, and I believe the State, that at some point this would take place. Because it was not due to any error on our part that it had not been done.

But it became apparent that the sooner—once this evidence here came in—

[362] Q. What evidence here do you mean?

A. The gun—the sequence.

Once that was coming in, the sooner we had the benefit of that psychiatric, the better off we would be.

Q. When did you actually learn the existence of that diagram—about the sequence?

A. As I told Mr. Prospect, I don't know exactly when it was. It was very early in my involvement in the case.

Q. Okay. But you went to trial not prepared or not knowing it was going to be used?

A. I went to trial prepared with the idea that it may be used. Mr. Harper, you don't file a motion to get this information out as an issue if they have not thought of it or if they were not going to use it. Why alert them to a piece of evidence which is damning by its nature?

Q. Okay. So it was not until the second day of the trial that you learned that it was going to be an issue in the case.

A. As far as I was concerned, if it came in, there was no question that would be an issue.

Q. Did you take a deposition of Dan Weatherford, pre-trial?

[363] A. No, sir.

Q. Now, this meeting with the deputies to pump them for information, so to speak, was the entire meeting at this bar in Homosassa?

A. Yes, sir.

Q. How many hours were you all there?

A. I think I indicated three or four—something like that.

Q. From approximately eight to midnight?

A. Yes.

Q. And you had four, five or six drinks?

A. That's a guess.

Q. Possibly more, possibly less?

A. Possibly more, possibly less.

Q. Do you recall what you were drinking?

A. No, sir, I don't.

Q. Do you recall they were singles or doubles?

A. I'm sure they were singles.

Q. Okay. But you were basically getting into it to be one of the boys, I believed it was categorized; is that correct?

A. Yes, sir.

Q. And this is after Mr. Darden had filed a motion to dismiss counsel alleging, in part, that Mr. [364] Johnson and yourself, in his opinion, were in collusion with the State Attorney; is that correct?

A. Yes, sir.

Q. Did you have any second thoughts that that might give some appearance of impropriety to your client, Mr. Darden, who was on trial for his life?

A. Mr. Harper, when you're involved in the defense of a case that has all of the elements of a death case, as far as I'm concerned, you do that which is expedient to do in order to try to do the best job for your client.

I did not consider whether or not my meeting with the deputy sheriffs of the Polk County Sheriff's Department in

order to find out information which they had and I did not have, would serve any purpose except to be in this man's benefit over here, and if it was looked on as improper, then that was the chance I was taking. And I assure you had we been able to obtain a not guilty verdict up there, the issue of my being with them at that time would not be raised at this time.

Q. As far as the closing argument of Mr. McDaniel was concerned and your tactical decision to allow him to continue, at what point were you going to object?

A. Probably toward the tail end.

[365] Q. What you've just testified to was, though, that the tail end was whenever you objected—whenever the objection was made. So how much longer were you planning to have, as it has been conceded, inflammatory argument to continue?

A. Well, if my recollection is correct, when Mr. Maloney did object, I leaned over and said something to the effect, "Go ahead and object."

Q. You leaned over Mr. Darden to say that; is that correct?

A. As I recall, Mr. Maloney was sitting next to me at that point.

Q. But you were allowing, in a death case, prejudicial and inflammatory argument to go to a death qualified jury without making an objection, deliberately; is that what you said.?

A. I'm saying that perhaps I let in improper argument. It is questionable still in my mind as to just how inflammatory it may have been.

Q. You had some doubts as it being inflammatory?

A. Mr. McDaniel bothers to avoid the issues. If you weren't there and you didn't see it, it was almost an indictment of the jury, itself, which I referred to a number of times in my closing argument.

The pounding of the rail, the pounding of the [366] jury rail—I think my final argument indicates that it's hard to tell from Mr. McDaniel's argument who's on trial here, Mr. Darden or the jury, because that was the nature of the argument, itself.

Q. What about the part where Mr. McDaniel categorized Mr. Darden as an animal and an admitted prisoner who had a gun in his possession—did you consider that inflammatory or prejudicial?

A. There was testimony to the effect that he had a gun.

Q. Did you consider that part about him being a prisoner and an animal prejudicial?

A. There was testimony that he was a prisoner; there was testimony that he had a gun.

Q. What about the part about him being an animal though?

A. The animal thing got blown somewhat out of proportion because of the comment Mr. Maloney made, which I'm sure he would have liked to have not said.

The issue was, in final argument, that this was not the man that committed the crime. The man that did commit the crime was, indeed, an animal, but this was not the man that did it. And unfortunately, Mr. Maloney mentioned that phrase which was jumped upon by Mr. McDaniel—in his closing argument.

[367] Q. What about the part where Mr. McDaniel wished it was Mr. Darden's face that had got blown in; you think that that was inflammatory or prejudicial?

A. Possibly. I believe that courts have held that in heinous crimes where the testimony indicates a heinous situation, that a fair comment.

Q. What would be a fair comment about blowing the defendant's face away, Mr. Goodwill?

A. I didn't derive the standards.

Q. No, but apparently you're trying to defend the justice of them.

A. Well, Mr. Harper, if you want to get to the point of the closing argument, it's very interesting that the reason we are in the courtroom today and the reason that Judge Hodges—my understanding is—stayed the execution in this case, is because there was no objection to that final argument and it was allowed to stand.

Now, you're attempting to come back into this court and say that because of a tactial move on our part which allowed that argument to stand, which has saved this man's life to this point—that we were in error.

Q. Well, there's some dispute as to whether it was a tactical decisions or attorney's misfeasance.

[368] A. I will—

Q. Let me finish my question. And that's part of what we're here to determine. But rather than get into an argument with you, I would like to ask you a few more questions.

A. All right, sir.

Q. Did you believe that any of the arguments by Mr. McDaniel were in the nature of personal opinion as to credibility or weight of either evidence or witnesses?

A. He discussed very little about evidence. What was the first part about?

Q. Did you think that any of the closing argument by Mr. McDaniel was in the nature of being a personal comment on his part on either the weight of the evidence or the credibility of witnesses?

A. Mr. McDaniel's final argument did not get into the issues of weight of evidence or credibility of witnesses. He didn't talk about the issues. I was somewhat satisfied from the standpoint that he was not talking about the issues, because

that was my intention on my closing issue—to talk about the issues, the lack of evidence, the credibility of witnesses.

Q. Did you believe that either or any of Mr. McDaniel's statements in closing argument were in the nature of calculated attempt to inflame the passions [369] of the jury?

A. Calculated attempts?

Q. Let me rephrase the question.

Do you believe that any of Mr. McDaniel's statements in closing argument amounted to attempt to inflame the passions of the jury?

A. Perhaps.

Q. And what points of argument do you think amounted to attempts to inflame the passions of the jury?

A. The avoidance of talking about the issues.

Q. And talking about something else apparently—and what was that?

A. The improper portion of that argument, to my way of thinking, was the comment regarding the Division of Corrections.

Q. And as a tactial decision you declined to make objections to that?

A. That's correct. And at the time the objection was made, the trial court had the opportunity at that point in time to correct the error, if there was, in fact, error.

Q. Do you know how much argument continued after the objection was made by Mr. Maloney?

A. Basically, none.

[370] Q. In fact, just a couple of more minutes and it was all over; is that right?

A. (No audible response)

Q. I need you to answer for the record.

A. Yes.

MR. HARPER: That's all we have at this time, Your Honor.

REDIRECT EXAMINATION

BY MR. PROSPECT:

Q. May it please the Court. As I understand, Mr. Goodwill, it was your intention at all times, notwithstanding that Mr. Darden had been examined by county officials or state officials, to seek an additional psychiatric examination by private individuals?

A. Yes, sir.

Q. What was going to be the purpose of securing such an examination?

A. Perhaps twofold, depending on the results, it's possible that they could have been used in defense.

Q. As an insanity defense?

A. He had already been found incompetent—

Q. Excuse me—did you say incompetent?

A. Excuse me. He had already been found competent and to have this psychiatrist come back with a finding of incompetency, certainly it would have raised [371] an issue at that point in time.

But I'm thinking more from a standpoint that if his examination revealed, for example, a personality who could not have committed this type of crime. If I could have received this type of statement from the psychiatrist; based on my examination of this man he is not one who could have committed this serious type of crime, that might have been something we could have used in defense.

That might have been worthwhile as far as any final argument or any other consideration, although it would certainly

have opened up some problem areas as far as cross examination of the psychiatrist, which is always a problem.

Second thing is that we may have been able to use his report on the sentencing portion in the event we got a verdict against us.

Q. How long did you spend preparing for the penalty phase of the trial?

A. Penalty phase—it had been indicated to us the day before by Judge Dewell that immediately upon the rendering of a verdict in the event it went against the defendant, that we would move into the sentencing phase post haste.

I had done some work on it that night or that evening, what I could, as far as sentencing phase is concerned. We had been—the psychiatric report was devastating.

Q. Well, before you get to that, had you spoken with Mr. Darden about the possibility of receiving an adverse verdict?

A. Yes, sir.

Q. And in light of that possibility, what may or may not have been able to have been able to be presented in sentencing?

A. As I recall, we did, and at that time we went through basically the statutes in existence at the time regarding mitigating and aggravating circumstances—what things would be available to us and at this point in time we were fairly limited statutorily by what things were in the statutes as far as mitigation, although it had been indicated to me by Judge Dewell that he would not necessarily hold us to those things if we had something which was relevant.

Q. Did you spend at least ten or fifteen minutes in preparation for penalty phase?

A. Oh, yes, sir.

Q. More?

A. Yes, sir. After the trial I—as far as penalty phase was concerned, it's been alleged that there was a ten minute recess. I think it was more like thirty-five or forty minute recess. The time I spent in that period of time was to interview Ms. Turman, who I had some occasion both by taking her deposition and I recall some conversation with her in passing, that she would not press for the death penalty.

I asked Judge Dewell if he would allow me to interview her during that period—during that recess—to see what her feelings were.

He, of course, was very concerned that I did not get the woman in there and browbeat her as far as this was concerned.

As I recall, he asked someone—one of the court officials or someone—to be present in the room and, as I recall, I spent twenty or twenty-five minutes talking with Ms. Turman to see if I could not convince her to go in and ask for the jury not to give him the death penalty, or at least not press for the death penalty.

Q. In other words, present her as a witness on behalf of Mr. Darden.

A. Yes, sir.

Q. The wife of the victim.

A. Yes, sir.

Q. How did that turn out, by the way—the [374] interview?

A. She was fairly noncommital. As I recall, her response was to the effect that she would not ask the jury not to put him to death, but that if he was the one that had committed the crime, that he should pay in accordance with the law.

Q. Did you receive—

A. But she was not adamant about it, but it was not a good position from my standpoint as far as sentencing was concerned.

Q. Did you receive a psychiatric report from the people in Tampa?

A. Yes, sir.

Q. Why didn't you use it in mitigation?

A. Do you want—

Q. I want the reason why you didn't use it.

A. You want me to tell you what it said?

Q. If that is part of the reason why you didn't use it, yes, sir.

A. I failed to ask at the beginning of this whether or not there has been any confidentiality waiver in this matter, and I think at this point that I would like to request the Court to tell me whether or not there has been a waiver of attorney-client privilege.

THE COURT: In those matters material to the [375] issues before the Court, Petitioner has waived the attorney-client privilege. His privilege to assert—he is not asserting in answer to that question. You may answer the question.

THE WITNESS: Thank you.

A. (Continuing) It was indicated to me by the psychiatrist that, based on his examination of Mr. Darden, that he very well could have committed the crime; that he was, as I recall his term, sociopathic type personality; that he would act entirely on impulse with no premeditation from the standpoint of planning. But that when a situation arose, the decision would be made simultaneously to commit the act.

I—based on that report, there was no way I could put that psychiatrist on the stand to testify about a crime which appeared to be very impulsive.

Q. Mr. Goodwill, do you know of any search and seizure involving the petitioner, Mr. Darden, that was conducted by the authorities, at any time?

A. That of the automobile.

Q. Was anything seized as a result of the search, used against him at trial?

A. No, sir.

Q. Do you recall that part of the trial—I believe at the beginning of a given day's proceedings—[376] the Court made the remark along the lines that, "I believe the defendant has another multitude of motions to file today." Did you consider that statement objectionable?

A. No, sir.

Q. Do you know of any legal grounds that would have given you a valid good faith basis, or even a bad faith basis, to object or make requests for sanctions or mistrial or what have you?

A. As I recall, that was made at the bench. The venire was some distance away—I doubt if the venire even heard the comments. The practical matter was that Mr. Darden did usually have a multitude of motions to file at any hearing.

Q. Do you recall moving to strike the venire?

A. At which point?

Q. At any point.

A. Yes, sir, I believe I moved to strike the venire on two occasions.

Q. Did you do so in writing?

A. No, sir.

Q. Any reason why you failed to submit your motion in writing?

A. I believe I indicated to Judge Deweli, prior to the time that we came into the courtroom, that I [377] was going to file a motion to strike the venire. He indicated to me that I could go ahead and file it, but that he was going to deny it.

Q. You knew he was going to deny it before you filed it?

A. Yes, sir. And I renewed the motion in the courtroom. I believe his comment was, "Oh, I previously told you that I was going to deny this motion, and it is denied.

Q. All right, sir. Do you recall the direct examination of Ms. Turman when she got to the point in her testimony where she testified—I believe that after Mr. Darden has shot her husband between the eyes—he turned to her and told her to take out her teeth and suck his penis. Do you recall that part?

A. Yes, sir.

Q. Did you consider that objectionable testimony?

A. Legally or personally?

Q. Legally.

A. No, sir.

Q. Why not?

A. My feeling, it was res gestae.

Q. Was her testimony in that respect—was it a narrative form of what transpired from point one to the end of the time, as far as she was concerned?

[378] A. As I recall, it was.

As I recall this testimony occurred in between her husband's being shot and the shooting of Phillip Arnold, and that was narrative in that venire.

Q. Did you object to the admission of the firearm into evidence?

A. Yes, sir.

Q. Would you care to reconsider that answer?

A. It's my recollection at the time that—I believe the firearm was introduced by Mr. Weatherford for introduction into

evidence, and I do not believe the FBI agent—that there was an attempt to introduce the firearm at that point.

I may be mistaken. As I indicated to Mr. Harper, I did not examine the record and I don't recall the sequence. But I don't believe the firearm was actually introduced into evidence until Mr. Weatherford testified and tied the firearm to the crime by the sequence, the cylinder sequence.

Q. And you did object to that?

A. Yes, sir, strenuously.

Q. Do you happen to know who owned the automobile in which Mr. Darden was riding that day—or driving?

A. Mr. Darden told me that Macie Wright, his girlfriend in Tampa, owned it.

[379] Q. Do you recall a point in the trial when Mr. Maloney referred to the indictment as an information?

A. No, sir, I don't.

Q. If I told you that he did, would you consider that some grounds of mistrial or error or improper remarks or something?

A. I may have done—no, it's a slip of the tongue.

Q. Are you familiar with the motion to dismiss the indictment that was filed by the office of the Public Defender on October 9th, 1973?

A. Is that the Furman motion?

Q. I'm showing the witness Volume I, Page 35 through 40 of the record on appeal.

A. Yes, sir, I'm familiar with the fact that it was filed.

Q. Did you have any input into this motion?

A. Did I?

Q. Yes, sir.

A. No, sir, I did not.

Q. Do you know who did?

A. Mr. Johnson. I—I take that back. As I recall, that motion was a result or came about as a result of a conference of the Public Defenders of the State of Florida, held sometime previous to this, in which this [380] particular argument and type of motion was discussed at some length and prepared through a cooperative effort of the Public Defenders of the State of Florida.

MR. PROSPECT: Thank you, Mr. Goodwill. I have nothing further, Your Honor.

MR. HARPER: May it please Your Honor—

THE COURT: Yes, sir.

RECROSS EXAMINATION

BY MR. HARPER:

Q. As I remember, during the penalty phase, Mr. Goodwill, you were preoccupied with Ms. Turman in preparing or deciding whether or not to use her testimony during your penalty phase.

A. Yes, sir.

Q. What was Mr. Maloney doing at that time?

A. I don't recall.

Q. Who actually excused the witnesses—defense witnesses?

A. What do you mean?

Q. Who actually told them to go home?

A. The ones that—

Q. The defense witnesses.

A. The ones that were in the hall?

Q. Yes, and in the witness room or wherever else they were.

[381] A. I don't recall. It may have been a bailiff.

Q. At your instructions?

A. It was at our instruction, yes.

MR. HARPER: That's all I have, Your Honor.

THE COURT: Any reason why this witness should not be excused from his subpoena?

MR. HARPER: No objection, Your Honor.

MR. PROSPECT: No reason, Your Honor.

THE COURT: All right, sir. You are excused. (Witness retires from stand)

MR. PROSPECT: Respondent has nothing further, Your Honor.

THE COURT: All right. Mr. Harper?

MR. HARPER: No rebuttal.

THE COURT: For the record and at this hearing, stipulate in the provisions that the entire record on appeal would be an exhibit in this case; is that correct, counsel?

MR. PROSPECT: Yes, Your Honor.

MR. HARPER: The higher trial file, as I understood.

THE COURT: And the record on appeal, also?

MR. HARPER: I'm sure that would be a part of it, yes, sir.

THE COURT: All right. It will be considered.

* * * *

Supreme Court, U.S.
FILED
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CLERK

No. 85-5319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the deliberate and tactical choices of counsel, though ultimately unsuccessful, lessened the Eighth Amendment's requirement of reliability that the sentence of death was appropriate?

2. Whether the excusal of venireman Murphy met the standards of review announced in Wainwright v. Witt, 468 U.S. ___ (1985)?

3. Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his trial?

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STATEMENT OF THE CASE

STATEMENT OF THE FACTS: James Carl and Helen Turman owned a furniture store doing business as Carl's Furniture in Lakeland, Florida. Mrs. Turman ran the store, and her husband worked at a juvenile home. (TT 200)* The couple lived in a house located behind the furniture store. (TT 201) On September 8, 1973, Mr. Turman was working a midnight

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*The state trial record consists of eight volumes and a one volume supplement. The first two volumes are successively numbered through page 370 and contain the indictment, motions, and transcripts of hearings. References thereto will be made by the designation "R" followed by the appropriate page number. The transcript of trial proceedings, including voir dire examination, begins in volume III and goes through volume VIII with pages being successively numbered 1 through 918. References to that part of the re-record will be designated by "TT" followed by the appropriate page number. References to the supplement to transcript of record will be designated by "SR" followed by the appropriate page number. The transcript of the habeas corpus hearing will be designated "HC" followed by the appropriate page number. All other references will be made to the joint appendix or supplemental appendix by the designation "JA" or "SA" followed by the appropriate page number.

shift and at approximately 5:00 p.m. his wife called to awaken him. Shortly thereafter, he came over to the store and had a cup of coffee. Mr. Turman returned to the house to let the dogs out for a run. Mrs. Turman stepped outside of the store and closed the door and watched. After the dogs' run, the Turmans put the dogs back in the house and Mrs. Turman returned to the store alone sometime between 5:30 and 6:00 p.m. (TT 233)

As she opened the back door of the store, she confronted Willie Jasper Darden. But for Mrs. Turman and Mr. Darden, the store was empty. In response to his request, Mrs. Turman showed Darden around the store. Apparently, Darden then left telling Mrs. Turman that his wife would be back. (TT 205) He then returned asking to see some stoves. After an inquiry of price, Mrs. Turman started toward her adding machine. (TT 205) At

that point Darden grabbed Mrs. Turman, stuck a gun in her back, and said, "Do as I say and you won't get hurt". (TT 206) He then pulled down a loading door and asked Mrs. Turman for a key to the glass-sliding door. (TT 206) When told there was no key, he ordered Mrs. Turman to fasten the door with a stick and told her, "Don't try anything funny". (TT 206)

Darden then took Mrs. Turman to the back of the office and told her to open the cash register. He emptied the cash register of only the bills which Mrs. Turman estimated amounted to no more than $15.00. He ordered Mrs. Turman to the back of the store where she became weak. (TT 207) As Mrs. Turman was being taken to where some boxsprings and mattresses were stacked against the wall, Mr. Turman appeared at the back door and was warned by his wife not to come in.

(TT 208) Darden shot Mr. Turman between the eyes, and then pointed the gun at Mrs. Turman and said, "Stand still, don't move". (TT 208) While holding the gun on Mrs. Turman, Darden went over to her fallen husband and tried to pull him into the building and close the door, but was unable to because one of Mr. Turman's feet was in the way. (TT 209)

Darden then told Mrs. Turman to get down on the floor at a point approximately five feet away from her husband. (TT 210) Mrs. Turman asked if she could go to her husband and Darden replied that he was all right, that he only shot him in the shoulder. (TT 210) He then told Mrs. Turman to take out her teeth and at the same time unzipped his pants and undid his belt buckle. (TT 210) He told Mrs. Turman to suck his penis. (TT 210) Mrs. Turman cried, "Lord, have mercy". (TT 210) She again cried, "Lord, have

mercy", and Darden told her to get up and to back towards the front of the store.

As the two were walking toward the front of the store a young neighbor and part-time employee, Phillip Arnold, aged sixteen, opened the back door. (TT 211) Mrs. Turman screamed for him to go back. (TT 212) Darden left Mrs. Turman and ran toward Phillip Arnold.

Phillip Arnold's mother had told him that something had happened to Mr. Turman and for him to go help Mrs. Turman. (TT 430) He ran to the store, and as he got to the back door he saw Mr. Turman lying partially in the building. (TT 432) Phillip attempted to bring Mr. Turman into the store and heard Mrs. Turman say to go back. (TT 433) He didn't know what she meant and instead asked Darden to come help get Mr. Turman indoors. (TT 433) Darden said something to the effect of "Sure, buddy, I will help you". (TT

433) As Phillip looked up, Darden was pointing a gun at his face. (TT 435) Darden pulled the trigger and the gun "clicked". (TT 436) Darden pulled the trigger again and shot Phillip Arnold in the mouth. (TT 436) Phillip Arnold started to run away from the store, and Darden shot him in the neck. (TT 436) As he was still running away from the store, Darden shot Phillip Arnold yet a third time. (TT 437)

Petitioner's statement regarding the weapon is only partially accurate. The firearms expert testified that although the surface mutilation to the bullet made it unable to positively state that the bullet had been fired from the gun, it was his expert opinion that it could have been fired from that particular weapon. (TT 347) The width of the grooves, the number of grooves, the direction of the twist of the rifling was

exactly the same as those produced by that weapon. (TT 349) Additionally, the arrangement in the cylinder of the weapon when found was such that if the exact sequence of shots and the click had been duplicated, the hammer-to-bullet relationship would be, and was, identical. (TT 521, 522, 537, 542)

Petitioner's statement of fact regarding the identification likewise is incomplete and to a certain degree inaccurate. Mrs. Turman never told the officers that she could not remember what Darden looked like. Under cross-examination, Mrs. Turman testified only that she was poor at giving definite descriptions of people, but that she very definitely did remember faces. (TT 232) She never paid much attention to how customers dressed. But, she remembered her customers. (TT 232) While it is true she was scared during the incident and at one

point put her hands over her face, that occurred after Darden had shot Phillip Arnold. (TT 281) Her face was uncovered during the times she was showing Darden the furniture, when he took the money out of the cash register, and when he attempted to have her perform the sexual act. (TT 281)

Petitioner's statements regarding the identification at the preliminary hearing is likewise insufficient. Between the time her husband was killed and the time of the preliminary hearing, Mrs. Turman had read no newspaper account of the incident and had not seen any photograph of Darden. (TT 230) No police officers or any other individuals had even attempted to show a photograph of Darden to the woman. The identification took place only five days after the incident. Mrs. Turman had viewed Darden for approximately ten minutes

during the incident. (TT 230, 231) Mrs. Turman recognized Darden when she came into the courtroom, (TT 283) and even with his back to her, she recognized Darden as the one who shot her husband. (R 53)

Mrs. Turman repeatedly and positively identified Darden at trial.

The remainder of appellant's statement of facts is supported by the record notwithstanding his dramatic embellishment thereof. Respondent would only add that although venireman Murphy was excluded after being asked but one question, his excusal came after that question, in exact or approximate form, had been asked repeatedly and after several other prospective jurors had been excused for the same reason.

An addition to petitioner's statements regarding the closing argument is the fact that no objection was made to

any of the allegedly inflammatory remarks. One objection was made to a statement of the prosecutor on the grounds that the statement lacked evidence. (TT 751) Another statement was made by the defense requesting the court to again instruct the prosecutor to stick to the evidence. (TT 791)

The lack of objection was due to a deliberate and tactical choice of counsel. (SA 46) Defense counsel Goodwill had known prosecutor McDaniel since law school, and felt that if allowed, McDaniel would make such an argument that it would constitute reversible error on appeal. (SA 47) Goodwill specifically prevented junior defense counsel Maloney from objecting to a remark made early in the prosecutor's argument. (SA 46) After Goodwill felt McDaniel had gone far enough, he leaned over and told Maloney to object. (SA 69) The reason for this

tactic was, in the event of not securing a verdict of not guilty, to allow the commission and preservation of automatic error for appeal. (SA 47) The purpose of that was to secure a new trial and attendant delay so that the passage of time might help the situation. (SA 48)

SUMMARY OF ARGUMENT

Under the facts and circumstances of this case, the deliberate choice not to object to the prosecutor's closing argument so that automatic reversible error would be committed, was reasonable. Although that choice permitted improper and tasteless remarks to be made, those remarks did not rise to a level which either destroyed the fundamental fairness of the guilt phase or in any way lessened the reliability that the sentence of death was improperly imposed.

Given the fact that venireman Murphy was present in the courtroom during the entire process of voir dire which preceded his being called into the jury box, his answer to the one question made it sufficiently clear that his views towards capital punishment would not enable him to follow his oath as a juror

and the law as instructed.

Since no additional relevant mitigating evidence was available at the time of trial, and none has been offered now, Darden's lawyers rendered effective assistance of counsel during the sentencing phase of trial. Neither operation of law nor other perceived basis created the belief that presentation of evidence in mitigation was restricted to that statutorily enumerated.

ARGUMENT

I

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE CLOSING ARGUMENT OF THE PROSECUTOR, WHILE IMPROPER, DID NOT LESSEN RELIABILITY THAT THE DEATH SENTENCE WAS PROPERLY IMPOSED

Procedural posture of the issue.

The writ in this case is directed to the judgment of the court of appeals reported as Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985). That judgment, reinstating the panel opinion, 699 F.2d 1031, affirmed the district court's denial of Darden's habeas corpus petition. On the issue of closing argument, the original judgment of the court of appeals was in agreement with the district court's conclusion that the prosecutor's comments did not deny Darden a fundamentally fair trial. This judgment was in response to Darden's claim that the arguments were

so prejudicial as to constitute a denial of his right to due process. Neither the district court nor the court of appeals passed any judgment on the issue of whether the closing arguments deprived Darden of any rights under the Eighth Amendment. Although Darden has in one form or another claimed that the closing arguments affected sentencing, the issue he originally framed to the district court was one directed solely to the effect the remarks had on the determination of guilt or innocence. Admittedly, Darden urged the court of appeals to consider the issue in all his petitions for rehearing. The fact remains, though, that the court of appeals reviewed only the determination of the district court that the verdict was not the product of a fundamentally unfair trial.

As such, the court of appeals has rendered no judgment on Darden's Eighth

Amendment claim. This fact appears to have been overlooked by the two dissenting judges who presumably voted to rehear the cause for a fourth time and would have considered the issue. Darden v. Wainwright, 772 F.2d 666 (11th Cir. 1985). We submit, however, that the desire of two judges of the court of appeals is not equivalent to the judgment of the en banc court.

Therefore, unlike the situation in Caldwell v. Mississippi, 472 U.S.___, 105 S.Ct. 2633, this Court does not have the benefit of the lower court's views on the issue. That being true, it is suggested that even Caldwell would render this claim jurisdictionally deficient.

Merits of the claim. In spite of the above, should the issue be considered properly before the court, we offer the following in response to the merits of the claim in light of the unique

procedural history of this case.*

Caldwell established that the Eighth Amendment requires considerable reliability in the determination that

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*The willingness to consider the closing argument issue on the merits has been consistently expressed by all courts despite the state's just as consistent reliance on the procedural default. On direct appeal of the Florida Supreme Court, the state's sole position was the lack of specific objection to the allegedly inflammatory remarks. On certiorari review in this Court, we again stressed not only lack of objection, but also the failure to raise a federal question. In district court, we initially relied on the lack of objection but then after hearing, included the position that the lack of objection was due to a deliberate and tactical choice. Indeed, the state even cross-appealed the failure of the district court to properly consider and apply the choice not to object and resultant waiver of the issue, relying on Garrison v. McCarthy, 653 F.2d 374 (9th Cir. 1981). The panel opinion, 699 F.2d 1091, confused the basis of the state's cross-appeal with that part of its brief observing that the district court's suggestion that Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979), could allow the application of Wainwright v. Sykes, 433 U.S. 72 (1977), so as to bar considerations of the claim on the merits. Also, contrary to the panel opinion, the state has never suggested that the Florida Supreme Court did not consider the claim on the merits; it was our suggestion that since the court also applied the state's contemporaneous objection rule, procedural default was a viable basis to affirm. See the state's petition for rehearing to the panel opinion, pp. 3-4.

death is the appropriate sentence in a specific case. That which undermined the reliability in that case was a statement of the prosecutor, repeated by the trial judge, made to the sentencer--the jury. For the reasons expressed, the determination that death was appropriate was rendered unreliable.

Given this need for reliability, the operative issues as we view them are whether a prosecutor's closing argument during the guilt phase of the trial which had purposely been allowed to blossom into impropriety, under the facts and circumstances of this case, had any effect on the jury's decision to recommend the sentence of death. If there was such an effect, did it either lessen or destroy the requirement of reliability in that recommendation. If it did, does the Eighth Amendment allow the tactical choices of counsel to bind a capital

defendant and if so, to what degree.

Standard of review. The propriety of a prosecutor's closing argument in a federal prosecution was recently reviewed by this Court in United States v. Young, 470 U.S. ___, 105 S.Ct. 1058 (1985). At issue was whether the "plain error" concept embodied in Federal Rule of Criminal Procedure 52(b) permitted review of the argument in the absence of a timely objection by the defense. In resolving the issue, the Court stressed not only the doctrine of fundamental fairness, but also the notion that prosecutors remarks, even though inappropriate and amounting to error, must undermine that doctrine before a finding of "plain error".

In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(en banc), the court reviewed the closing arguments of a prosecutor in a Georgia capital case. The

court formulated a standard of review by borrowing from the principles announced in Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984). The court considered the prejudice element of the Strickland test as directly analogous to the fundamental fairness inquiry required to be applied in cases alleging improper prosecutorial argument. Donnelly v.DeChristoforo, 416 U.S. 637 (1974). In determining whether the remarks of the prosecutor produced a reasonable probability that they changed the outcome of the case, the court identified several reasons why it thought the Strickland test should apply to this issue.

The court found the Strickland test has as its objective the determination of fundamental fairness, is analytically similar to review of closing arguments since each remark must pass the threshold question of whether prejudice

had resulted, is sufficiently flexible to recognize errors of varying magnitude, and, is consistent with the standards discussed in Donnelly and subsequent cases employing the fundamental fairness standard by measuring the impact of the remarks against the strength of the case presented by the prosecution.*

We suggest that the Eleventh Circuit's approach to this issue and the standard of review it now applies is worthy of adoption by this Court.

Application of the standard to this particular case. All courts which have reviewed the closing remarks of the prosecutor have determined that the remarks did not destroy the fundamental fairness of the trial. All courts have

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*Last term in United States v. Bagley, (84-48, July 2, 1985) the Strickland "reasonable probability" test was considered sufficiently flexible so as to properly apply to a determination of whether non-disclosed evidence is material.

measured the impropriety of the remarks against the strength of the evidence against Darden and concluded, implicitly, that there was no reasonable probability that they changed the outcome of the case. In other words, there was sufficient evidence upon which to properly return a verdict of guilty without consideration to the remarks or the possible effect thereof. If the remarks did not unconstitutionally compromise the verdict against Darden, then it naturally follows that their effect on the sentencing recommendation was necessarily less, if any at all.

In this regard, we think it appropriate for Darden to be required to do more than merely quote the prosecutorial remarks, (time after time) inject considerations of race, malice and other emotional negatives, and then boldly assert the existence of prejudice--a sort

of constitutional "res ipsa loquitur". He does this, however, despite no court ever accepting the proposition. But for a magistrate and a few dissenters, the remarks have been universally tolerated, not condemned. This is especially focal since if the effect of the remarks did not destroy the fairness of the verdict which was the product of the jury, then it follows that the effect was even less (or none) on the sentence, which was not. Darden has failed to demonstrate how and why the remarks eliminated the reliability of the sentence. To be sure, none of the reasons producing reasons to fear substantial unreliability in Caldwell, are present here.

Although we maintain that no improper influence entered into the recommendation of death, as against the possibility that in a capital case prejudice would or could be presumed, prejudice here,

if any,must be measured in terms of that which produced it, i.e., the lack of objection. It was this omission which was responsible for anything past the very first objectional remark. This fact not only satisfied the "cause and prejudice" of Wainwright v. Sykes, 433 U.S. 72 (1977), but also the test which Sykes rejected: the knowing and deliberate waiver of Fay v. Noia, 372 U.S. 391 (1963). To ignore this would in turn ignore the concept of "sandbagging" which was specifically targeted as being eliminated in Sykes.

As a general statement, decisions relating to trial strategy are binding on the defendant. Henry v. Mississippi, 379 U.S. 443 (1965), Estelle v. Williams, 425 U.S. 501 (1976). We would not extend this principle as a hard and fast rule in capital cases which would automatically bar habeas corpus relief. Obviously

some tactical choices would be patently ridiculous. We would not demand that in those instances a capital defendant must suffer the consequences.

We submit that the binding effect of tactical choices can be measured and that the proper standard to be utilized is one of reasonableness. We submit further that the binding nature of tactical decisions places a burden on the defendant to show that the choice not to object was unreasonable under the facts and circumstances of a given case.

Here, Darden has failed even to acknowledge the reason for failing to object, much less discuss the rationale behind it. He ignores the very heart of the issue, and, by constantly harping on the irrelevant, he employs the identical tactic which he so vigorously attacks.

We contend that the decision not to object was reasonable. Based on his

knowledge and association with the prosecutor, defense counsel Goodwill expected McDaniel, as Goodwill put it ". . .to get much more vehement in his remarks if you allowed him to go on. . ." (SA 46) That Goodwill's expectations were fully realized is a classic understatement. McDaniel immediately started in on the Division of Corrections, (JA 15) and while he may have uttered many pointless and tasteless remarks, he failed to discuss the issues, the weight of the evidence, or the credibility of the witnesses. (SA 71) Goodwill capitalized on this and delivered a very skilled closing argument which emphasized the impropriety of the prosecutor, questioned the eyewitness testimony, and stressed the lack of hard evidence. From the very beginning, Goodwill attitudinized the jury against the prosecutor by referring to the prosecutor's yelling at

the jury; (TT 788) attempting to convict not on evidence, but on the strength of argument; (TT 786) putting the jury on trial; (TT 787) desiring to be an executioner; (TT 791) and storming around the courtroom slapping paper attempting to embarrass the jury into a verdict. (TT 794) Goodwill effectively neutralized the prosecutor's outrage by emphasizing that the righteous indignation present in closing argument was absent during cross-examination of the defendant himself. (TT 801)

During and after his condemnation of the prosecutor's antics, Goodwill continuously hammered on the evidence the state failed to produce and the weakness of the evidence it did produce. He stressed the possibility of mistaken identity, focusing on Phillip Arnold's medical condition (TT 788-790) and Mrs. Turman's state of shock and the discrepancies in

her prior descriptions. (TT 796) He argued that the gathering of evidence by the authorities was woefully insufficient, driving home the point that as soon as Darden was apprehended, the investigation seemed to have stopped. He reminded the jury that no paraffin test was administered (TT 813), no fingerprinting was done, (TT 814) and no footprints, tire tracks, or any other physical evidence was gathered. (TT 814, 815)

Based on the foregoing we state that under the facts and circumstances peculiar to this case, and this case alone, the remarks of the prosecutor did not improperly influence the jury's recommendation.* Since the possibility of

*Unlike the scheme in Mississippi, a Florida capital jury renders an advisory recommendation but does not actually sentence. The great weight requirement, Tedder v. State, 322 So.2d 908 (Fla. 1975), had not yet been decided at the time of Darden's trial. However, the trial judge indicated that he would put great weight in what the jury thought and what the jury recommended. (TT 905)

improper affect on the recommendation was at least remote, the reliability of the sentence ultimately imposed was in no way compromised.

In Murch v. Mottram, 409 U.S. 41 (1972), a state trial judge advised defense counsel that the defendant was required to bring all his claims, including the constitutional challenge subsequently asserted, at that time or they would be waived. After conference with the client, counsel elected not to pursue the issue. Subsequently, in a federal habeas corpus court, the defendant testified that he had not intended to waive his constitutional attacks in the state court post-conviction proceeding. This Court rejected the notion that a subjective declaration not to abandon or waive a claim could suffice to preclude a finding of a deliberate by-pass of orderly state procedures. If it could, then valid state

procedures with legitimate interests aimed at being served thereby would be utterly meaningless. The principles of Murch significantly add to the proposition that under the facts and circumstances of this case, the deliberate choice not to object was reasonable and thus binding on the defendant.

Terminally, we observe that evidence of the aggravating factors was proven beyond a reasonable doubt. Despite the recommendation of the jury and whatever weight was assigned to it, the sentencer still detected two factors in mitigation. It occurs to us that if the arguments infected the recommendation, and the recommendation in turn infected the actual sentence, then the likelihood of finding those factors in mitigation would have been non-existent. There simply is no reasonable probability that, absent the alleged prejudice of the

remarks, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

II

PROSPECTIVE JUROR MURPHY WAS PROPERLY EXCUSED FOR CAUSE SINCE HIS VIEWS TOWARD CAPITAL PUNISHMENT SUBSTANTIALLY IMPAIRED HIS DUTY AS A JUROR TO FOLLOW THE LAW

Darden's argument is one limiting consideration of the issue to an isolated situation which he alone creates. As has been appropriately observed:

> To suggest that the trial court's ruling was based upon one question and one answer is to ignore reality (and the record of the state court's proceedings).*

Proper perspective reveals that venireman Murphy was the last of several who were excused for cause because of views towards capital punishment.

Murphy had been present in the

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*Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984) en banc, Fay, dissenting. Judge Fay authored the original panel opinion finding no Witherspoon violation. The passage quoted above is from his dissent from the en banc opinion which did find a Witherspoon violation. After remand from this Court, however, Judge Fay's views commanded those of ten members of the court.

courtroom and presumably had listened to the entire voir dire proceedings which preceded his being called into the box. It is more than a fair conclusion that based on the respective exchanges regarding capital punishment, he certainly had time to reflect on his views toward the issue. While he may have been asked but one pertinent question, the fact remains that his answer was not something considered in a vacuum.

Darden admits that a proper standard was employed by the court of appeals. He complains, however, that the finding is not entitled to any degree of deference because the record fails to provide fair support for that finding. It is therefore propitious to compare the record in this case with that in Wainwright v. Witt, 469 U.S. ___, 105 S. Ct. 844 (1985).

In Witt, juror Colby could only

provide her thought that her personal beliefs would interfere with her sitting as a juror. She was asked only if she had religious or personal beliefs against the death penalty and whether those beliefs would interfere with her sitting as a juror in the case. Her strongest response to the pertinent question was that she thought so. Interestingly, none of the inquiries sought her beliefs in terms of the facts which might be proven. Here, Murphy was asked about his principles in opposition to the death penalty which would be violated to the extent that he would be unable to vote to recommend the death penalty regardless of what the facts might show. It was asked of Murphy whether those feelings were "so strong", and his answer was an unequivocal, "yes".

Respondent strongly submits that when Murphy told the trial judge that

his principles were such that he could not vote to recommend a penalty regardless of the facts, he was one who could not abide by his oath as a juror to follow the law. To conclude otherwise, would necessarily ignore Witt.

Unlike the situation relating to Mrs. Colby in Witt, no ambiguity is present whatsoever and thus, there probably existed no compelling need to assess Murphy's demeanor in determining the meaning of his answer. 105 S.Ct. at 857.

What's more, the excusal of Murphy (as well as all others so excused) was not made the basis of a specific objection that the principles of Witherspoon had been violated.* Admittedly, there was a continuing objection of the defense, but it was one directed to the state's intention of excusing jurors who

*Witherspoon v. Illinois, 391 U.S. 510 (1968).

were opposed to capital punishment and it was based on grounds of relevance. (JA 3-5) There was no specific objection aimed at informing the trial judge that a given excusal was thought to be insufficient under Witherspoon standards.

As in Witt, at the time Murphy was excused, no one in the courtroom questioned the fact that his principles prevented him from sitting. The excusal was proper.

Darden also presents the theory that the incorrect standard was utilitized by the trial judge in determining that Murphy was unfit for service as a juror. He contends that the judge should have pursued the inquiry to determine whether, given Mr. Murphy's views, he could nevertheless subordinate those views and follow his duty as a juror.

Although this position is discussed in terms of proper "standard", it

is nothing more than a restatement of the second part of footnote 21 in Witherspoon, couched in Witt language. The fundamental premise of this claim is that the trial judge failed to determine whether Murphy's attitude would have prevented him from making an impartial decision as to guilt. This notion is precisely that which was merged and simplified in Witt. Also, the reasons for the simplification apply with equal force to this case.

Perhaps the most compelling of the reasons is the one dealing with the notion of impartiality. That Darden now claims insufficient questioning by the trial judge and that he moved to limit the voir dire examination on grounds of relevance sought but only one objective--to have potential friends on the jury. Obviously, if Darden could have seated twelve jurors who stated

that their opposition to capital punishment would not have prevented them from making an impartial decision as to his guilt, then he would have secured the very real possibility that their respective views towards capital punishment might have affected the deliberations on guilt.

This potential for impartiality flows only from the situation in which jurors are opposed to capital punishment, since the state never seeks to seat only those jurors who are vigorously in favor of capital punishment; it only excludes those whose views against it might interfere with their deliberations. Contrary to the announcement in Witherspoon, such a jury is not "death prone"; it is merely impartial. However, a jury composed of people to Darden's liking would be "life prone" in terms of personal, religious, or moral attitudes. In the latter,

the jury would be truly "prone" whereas in the former, it would merely be indifferent, or at least willing to consider the requirements of law.

The impartiality of the jury must remain inviolate. Whether considered under the Sixth Amendment as in Witt, or under the Fourteenth Amendment, no scheme of jury selection should be permitted which results in a jury "tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant or to the nature of the charges to be tried." Hoyt v. Florida, 368 U.S. 57, 59 (1961).

Contrary to the view of the court in Grigsby v. Mabry, 758 F.2d 226, 232, n. 11 (8th Cir. 1985), cert. granted sub nom. Lockhart v. McCree, no. 84-1865, we think that a juror's oath to follow the law might be affected by conscientious

objections. While serious and solemn, the oath might give way once a juror has heard the evidence and is faced with the grave responsibility of determining a defendant's fate.

Murphy was properly excused and nothing more was needed to demonstrate that his personal beliefs would have interfered with his proper functioning as a juror.

III

DARDEN WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRED BY THE SIXTH AMENDMENT

In what was ultimately treated as the petition for a writ of certiorari, Darden contended that the alleged lack of investigation into non-statutory mitigating evidence was due to counsel's mistaken belief that Florida law limited such evidence to that found in section 921.141(b), Florida Statutes (1973). Now Darden claims that:

> The decision not to investigate was not an informed, tactical judgment. Rather, it was reached because counsel neither knew the law nor attempted to investigate and find out the law governing sentencing.

(Appellant's brief, p. 47)

The inconsistency in these positions is quickly apparent. There simply can be no good faith argument that defense counsel failed to investigate

evidence in mitigation due to a restrictive interpretation of Florida law. The record simply belies this. First, counsel, due to statements made in a deposition of Mrs. Turman, considered putting the lady on the stand in hopes of telling the jury that although Darden had killed her husband, she did not think he should be put to death for it. (TT 880) For the jury to have heard the wife of the victim claiming death was not an appropriate penalty would have been a very compelling and persuasive tactic. (SA 75) Such an effort, while appropriate and commendable, is not one statutorily enumerated. In fact, it is not one even relevant. But, it certainly demonstrates the lack of restrictive belief of counsel.

Secondly, that counsel specifically told Darden that he could take the stand and talk to the jury and say anything at all in mitigation is further

evidence that counsel did not feel in any way limited by the statute. (TT 883)

The same holds true for the trial judge. He specifically told Darden that family situation or any other personal matter that would be pertinent would be admissible. (TT 884) After discussing the statute regarding enumerated circumstances in mitigation, the court again told Darden that he was not limited to "these things". (TT 887) The judge repeated that any other factors that were pertinent to full consideration of the case, the analysis of Darden and his family situation, his causes, or anything else pertinent to the appropriate sentence would be entertained. (TT 887, 888)

Neither judge nor attorney felt restricted. It is clear that if there existed <u>any</u> evidence of mitigation, then it would have been offered and received.

Thus, the question redounds to

whether Darden received an individualized sentencing proceeding based on factors peculiar to him and his case. In other words, whatever the reason, did the failure to produce non-statutory evidence deprive Darden of his right to be constitutionally sentenced?

To that end, we are of course required to determine, under Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984), whether there is a reasonable probability that, absent the alleged errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

The above naturally leads one into consideration of the prejudice prong of the ineffectiveness test. Petitioner maintains that had his attorneys done more investigative work they would have come up with considerable "mitigating" evidence in terms of family life and

background.* He then focuses on the period of time between the guilt and sentencing phase to support his claim that the lawyers were literally unprepared for the second hearing.

We initially emphasize that the period of time that may have transpired between the two phases of trial does not necessarily equate to the amount of time the lawyers spent preparing for that eventuality. All the passage of time indicates is exactly that, and nothing more. Obviously, the lawyers spent time contemplating their tactics and course of conduct. Public Defender Johnson

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*Petioner includes extensive statements of so-called fact which he says is in the record of his second habeas corpus proceedings. That cause, he indicates, will be the subject of a petition for writ of certiorari and a motion to consolidate. We know of no authority that enables a future petition to be the source of fact. Accordingly, we reject any assertion thereof. In any event, these "facts" were not before the district court in the original petition and the second petition was dismissed as an abuse of the writ.

testified that his investigator and others, had searched for mitigating evidence, but could find none. (HC 232) Chief trial counsel Goodwill likewise went through the statute and had been told by the trial judge that the defense would not be restricted to only those statutory items. (SA 74) Therefore, it is a fair conclusion that the process of investigating Darden's background took more than the ten or fifteen minutes transpiring between phases of the trial.

Interestingly, when petitioner had his opportunity in the habeas corpus hearing to prove his allegations, he failed to inquire whether the attorneys knew of any evidence he today contends was mitigating. He asked only of the junior attorney Maloney whether any investigation took place but neglected to make pertinent inquiry of either the Public Defender or chief trial counsel.

The state did inquire though, and was told that nothing relevant could be ascertained either at trial or then at the hearing, some five years later. (SA 50)

Equally interesting, is the fact that the public defender's investigator, in his search for evidence of mitigation, more than likely turned up Darden's extensive criminal history beginning in 1949. Contrary to what Darden presents in his brief, his criminal history is far, far more than he would have us believe. Darden is the proverbial career criminal. We dare say that had Darden's attorneys presented this so-called mitigating evidence of family background and portrayed Darden as a man of "solid, non-violent character", it would have been a guaranteed ticket to the electric chair since the prosecution would have presented rebuttal evidence of his criminal history which would have rendered any notion of

"goodness" utterly incredible.*

Moreover, the allegation of Darden's background and family history are nothing more than just that. We all have a family background and personal history. However, we fail to see how a so-called deprived upbringing was in any way relevant to mitigate the shocking nature of the acts Darden committed on the Turmans and Phillip Arnold.

We do not suggest that a person's background may never be properly utilized to mitigate the conduct of that individual; we submit only that a general personal history offers little, if

---

*Darden is no novice in the system. Having been "in and out of jails for most of his adult life" he has become what is known as a "jailhouse lawyer". (HC 209) Perhaps because of this, Darden knew the danger of the trial judge reviewing his criminal record contained in a pre-sentence investigation report, and thus, personally asked that one not be considered. (TT 910)

Additionally, the defense did know of Darden's early deprived life and family background at least as early as October 17, 1973. (SR 92-94)

anything in terms of relevance. While Lockett v. Ohio, 438 U.S. 586 (1978), most assuredly established the right to present all evidence bearing on character and record of the accused, it very properly restricted presentation of that evidence to that which is relevant.

In short, while it is true that nothing in mitigation was offered on Darden's behalf, we think the record amply supports the reason as being because no such evidence existed.* The failure to present that which cannot be presented is not unreasonable.

The above is inextricably tied to consideration of the prejudice aspect of the test. Giving Darden the benefit of the evidence he says his attorney should have presented plus any other of

*Even the psychiatric report, hoped to be used positively at sentencing, (SA 74) contained a "devastating" opinion that Darden was just the kind of person who could have committed the crimes. (SA 76)

which he can think, there is no way that the balance of aggravating and mitigating circumstances did not warrant the sentence that was imposed. The weight of factors in aggravation was simply too much to overcome.

Giving the deference to the judgment of counsel that Strickland requires, perhaps it is prudent to remember that this case was either the first or one of the first captial cases arising out of Polk County, Florida. The trial judge had never presided over a capital case, much less sentenced anyone to death.*

We mention these facts only to suggest that trial strategy from a defense

---

*It is common knowledge that no execution had taken place in Florida for twelve years preceding Darden's trial. Also, at a hearing on a motion to vacate in the trial court held on September 2, 1985, counsel for Darden mentioned that the trial judge had less than a year's experience on the bench, a fact which Judge Dewell acknowledged. The judge also mentioned, however, that he had practiced for a good many years and had handled captial cases both as a defense attorney and as a prosecutor.

standpoint was certainly an open matter. The attorneys were representing a capital defendant at trial being held in a different county. The lawyers were confronted with a verdict of guilty, an obviously sympathetic and compassionate judge, (TT 883-889) and an uncertain recommendation to be forthcoming from the jury. We submit that under these particular circumstances, the judgment calls of counsel are entitled to as much deference as possible. The defense had already figured correctly in deciding not to put on an alibi defense, one which would have been weak as best. Had that been done, the prosecution was prepared to present evidence in rebuttal which would have virtually destroyed any idea of alibi. (SA 16)

While it cannot be said that the defense was as successful in not presenting any evidence that Darden was a

non-violent, caring, and warm human being, it is nonetheless true that in light of the potential responsive evidence that the state could have presented, the decision only to make a plea for mercy was reasonable.

Considering the circumstances of trial, the facts known at the time of trial, and the lack of relevant mitigating evidence, Darden's lawyers rendered constitutionally effective assistance

CONCLUSION

Based on the above and foregoing, we respectfully request this Court to affirm the judgment of the Eleventh Circuit Court of Appeals which determined that Darden was entitled to no habeas corpus relief.

Respectfully submitted,

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Supreme Court, U.S.
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No. 85-5319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

In its brief, the state argues and relies upon a number of factual premises that are controverted by the record. Some of these factual questions concern issues of guilt or innocence and, thus, relate to

the issue of prejudice -- if that question is in fact relevant to this case. Others form the basis of the state's arguments that there are putative jurisdictional defects or procedural bars that would prevent the Court from reaching the merits of the prosecutorial argument issue. Finally, the state makes incorrect assertions about what the courts below found concerning the facts surrounding the questioning of venireperson Murphy. In the sections that follow, we present what the record and the courts below actually said about these factual issues. The factual and legal errors that dispose of the state's putative jurisdictional and procedural points are set out in the argument sections that follow.

A. The Unreliability of the Identification Testimony

The state says that: "Mrs. Turman never told the officers that she could not remember what Darden looked like." Res. Br. at 7. The police report, reproduced as an appendix to this reply brief, indicates the contrary. In it, the officer reported that: "Mrs. Turman stated she could not remember what the subject looked like or what he was wearing." Appendix at ii.

The contemporaneous report of the police officer was corroborated by Mrs. Turman's trial testimony. When asked about her statement to the investigating officer, she replied: "I recall telling him as for giving a definite description, I am a poor hand at doing it; but I do remember faces. But to describe someone I can't really do it." R. 232.[1] Mrs. Turman

[1] In her deposition, she testified that: "I won't say exact [sic] because I just never

also testified that, when asked by the investigating officer whether she could identify the assailant, she replied: "I would try, I would try; I might -- I don't know." R. 233.

The testimony that Mrs. Turman "very definitely did remember faces," Res. Br. at 7, is particularly injurious to the state's arguments in support of the reliability of Mrs. Turman's in-court identification of Mr. Darden. For, at trial, she was certain that her identification of Mr. Darden at the preliminary hearing was made when she "saw his face ... on my way up to the stand." R. 283. Her deposition testimony similarly stated

---

was a type person to look, really look people over to give a description." Deposition of Helen Lee Turman at 4 (Oct. 31, 1973).

Citations to R. ____ are to the trial record; A.R. ____ to the record on appeal to the Florida Supreme Court; J.A. ____ to the Joint Appendix; and Supp. J.A. ____ to the Supplemental Joint Appendix.

that she identified Mr. Darden at the preliminary hearing by "the look on his face." Deposition of Helen Lee Turman at 28 (Oct. 31, 1973). But her testimony at the preliminary hearing -- when Mr. Darden was the only black man in the courtroom -- was very different indeed: "Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, 'That's him.'" A.R. 53 (emphasis added).

The state also attempts to bolster the problematic identification testimony by recalling that Mrs. Turman did not read any newspaper accounts and was not shown any photographs of Mr. Darden prior to the preliminary hearing. Res. Br. at 8-9. That, of course, is true. But it was Philip Arnold who read newspaper accounts of the incident and whose pretrial identification was thus tainted. Arnold twice admitted that he read newspaper

accounts of the incident, R. 458 and 462, and Mr. Darden's picture was in fact published in the local paper along with the reporting of the crime. See Deposition of Helen Lee Turman at 21.[2]

B. The Evidence Regarding the Gun

In its brief, the state cites and relies on the testimony of its firearms expert that "it was his expert opinion that [the bullet] could have been fired from that particular weapon." Res. Br. at

---

[2] There is other evidence, developed at the federal habeas hearing, that raises serious doubt about Mr. Darden's guilt. Mrs. Turman testified that she called the operator to report the murder while the assailant was still on the premises -- indeed, that she went in to make the call before the last shot was fired. R. 212, 243. The call to the police was logged in at 6:31 P.M. Supp. J.A. 56. The accident, which according to the state's theory occurred while Mr. Darden was trying to make his escape, took place 3.4 miles from the Turman store. Supp. J.A. 59-60. The County Sheriff's office, however, received a telephone call reporting Mr. Darden's car accident at 6:32 P.M. Supp. J.A. 57. It is not possible to traverse 3.4 miles by car in less than one minute.

6 (citing R. 347). The expert's conclusion was premised on the rifling marks on the bullet, which matched the boring of the gun barrel. Id. at 6-7. But the state does not disclose that in the same sentence in which that firearm expert made the modest claim that the bullet could have come from the gun found near the scene of Mr. Darden's car accident, he also said that "there were not sufficient individual characteristic marks to determine positively whether this bullet had been fired from State's Exhibit No. 1...." R. 347. Moreover, he admitted that the bullet could have been fired from any similar Smith & Wesson, of which there are a large number. As he testified:

> A. It would have been fired from another Smith & Wesson.
>
> Q. It could have been fired from any weapon similar to this?
>
> A. Yes.
>
> Q. A rebored?

A. Yes, sir, Smith & Wesson, yes. Most of them have the same rifling.

Q. Could that bullet have been fired from a .38 special?

A. Yes, sir.

Q. A normal Smith Wesson .38 special?

A. Yes, sir.

Q. Do you have any idea how many of these weapons are in existence in this country?

A. A large number.

R. 357-58 (emphasis added).[3]

C. The Voir Dire of Venireperson Murphy

The state claims that upon remand, the Eleventh Circuit embraced the theory of Judge Fay's earlier dissent, Darden

[3] Of course, petitioner has never denied that the gun introduced at trial had been fired in a sequence similar to the shooting during the crime. Compare Pet. Br. at 2 with Res. Br. at 7. But, there was nothing but circumstantial evidence either to tie petitioner to the gun or the gun to the crime.

v. Wainwright, 725 F.2d 1526, 1560 (11th Cir. 1984) (en banc); J.A. 356-57. That dissent contended that venireperson Murphy did not really answer the question put to him by the trial judge, but rather answered a different, constitutionally correct question asked earlier in the voir dire. Res. Br. at 32-33 & n. *. But the Eleventh Circuit did not advance this theory in its opinion on remand. To the contrary, the per curiam opinion below focused upon the question actually asked Murphy and held that although it "may not have been ideal, we cannot conclude that it was inconsistent with the 'substantial impairment' test articulated in Witt." Darden v. Wainwright, 767 F.2d 752, 754 (11th Cir. 1985) (en banc); J.A. 378.

As noted in the opinion of the en banc majority prior to remand, Mr. Murphy was not in the jury box before he was examined

and none of the judge's earlier questions was directed at him. 725 F.2d at 1531; J.A. 309.[4]

> [W]e cannot assume that Mr. Murphy heard the correct articulation of the Witherspoon standard or that, if he heard it, he remembered it and knew

---

[4] The actual selection of the jury in this case took place in the following manner: twelve members of the array were called to the jury box (R. 31-32), and were questioned both individually and as a group by the judge, the prosecutor, and defense counsel; whenever one of the twelve was stricken, another member of the array was called to the jury box to bring the number of prospective jurors in the box back to twelve (e.g., R. 83-84, 103-05, 130); and whenever one of these was stricken, yet another member of the array was added to the jury box to keep the number at twelve (e.g., R. 139, 150, 159, 165, 166). Although the twelve jurors in the box at any given time were questioned both individually and as a group, no member of the array outside the box was questioned at any time.

Murphy was the next to last member of the array to be placed in the box before selection of the jury was completed. He was questioned individually the moment he was seated in the box, and gave the answer that resulted in his exclusion (R. 165). Not having been in the jury box earlier, he had not been the subject of any questioning prior to that time.

> it to be the correct statement of the question when he was later questioned incorrectly.

Id. at 1532; J.A. 309. The subsequent per curiam opinion upon remand neither abandoned this reasoning nor embraced the theory of Judge Fay's dissent at which it was aimed. The state is perfectly free to advance that highly tenuous theory on its own, but cannot honestly claim that it bears the approval of the court below.

ARGUMENT

I. THERE ARE NO JURISDICTIONAL NOR PROCEDURAL BARS THAT WOULD PREVENT THE COURT FROM REACHING THE MERITS OF THE PROSECUTORIAL ARGUMENT ISSUE

In an attempt to avoid defending the indefensible, the state raises, first, a putative jurisdictional bar and, second, an alleged procedural default. We dispose of each in turn.

A. The Issue of Improper Prosecutorial Argument as It Relates to Sentence Was Raised in the Courts Below

The state argues that the decision of the court of appeals below discussed only whether the prosecutor's improper arguments deprived petitioner of fundamental fairness in the determination of his guilt or innocence. It further asserts that: "Although Darden has in one from or another claimed that the closing arguments affected sentencing, the issue he originally framed to the district court was one directed solely to the effect the remarks had on the determination of guilt or innocence." Res. Br. at 15. On these bases, the state argues that the judgment under review concerns the due process but not the eighth amendment attack on the improper prosecutorial argument. Id. at 14-16.

The state's reconstruction of the "not pressed nor passed upon" rule, see Illinois v. Gates, 462 U.S. 213, 217-24 (1983) (appeal from state court judgment), is both legally and factually flawed. Legally, the content of the judgment under review is not synonymous with the issues actually discussed by the court below. Cf. Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("And our power is to correct wrong judgments, not to revise opinions."). Rather, it is a function of the issues "raised[] and presented to the [lower] court....", Murdock v. City of Memphis, 87 U.S. (20 Wall) 590, 636 (1875); if the issue was properly raised, it is sufficient "that its decision was necessary to the judgment or decree, rendered in the case." Id.

The state's factual premise is equally unsustainable. The original habeas petition filed in the district court claimed that:

> Petitioner Willie Jasper Darden's conviction and sentence were obtained and imposed in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, for each of the reasons set forth more fully below. ...
>
> Within less than thirty-five transcript pages, the prosecutor time and again focused the jurors' attention upon the Florida Division of Corrections as that "unknown defendant" who, through the weekend furlough granted to petitioner, had turned him loose "on the public." (A. 12-13, 14-15); invited a conviction for first degree murder and the recommendation of a death sentence as "the only way that I know that he [the defendant] is not going to get out on the public" (A. 16); and expressed his "wish that the Division of Corrections was sitting in the chair ... with him [Darden]" (A. 36).

Petition at 4 (emphasis added). At the insistence of respondent, the issue was subsequently clarified and presented in

unmistakeable terms:

> Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth Amendment, and was imposed in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it was based upon proceedings in which the prosecutor was permitted to urge a death sentence upon grounds that were couched in inflammatory argument of the prosecuting attorney and improper professional conduct....

J.A. 196 (Magistrate's Report and Recommendation). The magistrate noted with particularity that: "Respondent has raised no objection to the inclusion of these ... claims...." J.A. 198.

Thus, it is clear that there is no jurisdictional defect. The most that can be said is that the Court lacks the benefit of a decision below on the eighth amendment claim. While the Court might vacate the judgment and remand for reconsideration in light of Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231 (1985), that is not called for in this

case because there are no facts relevant to the question presented undeveloped in this record. Compare Singleton v. Wulff, 428 U.S. 128, 120-21 (1976).

B. There Is No Procedural Default Barring Review of the Merits of the Prosecutorial Argument Claim

The state argues that the improper prosecutorial argument must be considered in light of the purported lack of objection and the alleged tactical decision of counsel not to object. Res. Br. 24-25. The state, however, candidly admits that not one of the courts below -- including the Florida Supreme Court -- has ever accepted the procedural default argument as a bar to reaching the merits of this claim. Res. Br. at 17 n.*. The court of appeals, for example, rejected the procedural default argument for two reasons.

> First, Darden's counsel did object twice during the prosecutor's final

> argument. Second, on direct appeal of Darden's conviction and sentence the Florida Supreme Court considered the issue. It is well settled that where a state appellate court has adjudicated an issue on its merits, federal courts may consider it in a petition for habeas corpus. ... The state's suggestion that the Florida Supreme Court did not dispose of the issue on its merits is untenable.

J.A. 271-72 (citations and footnotes omitted).[5] Similarly, the magistrate twice relied on the fact that there were objections, J.A. 204 & 214, and the district court concluded that because the Florida Supreme Court determined the issue on the merits, it could reach the merits itself on authority of this Court's decision in County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). J.A. 240.

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[5] In an omitted footnote, the court of appeals again noted "the fact that counsel did object, however inartfully." J.A. 272 at n.3.

The state nevertheless invites this Court to reexamine the question on the basis of testimony never credited by the courts below. Moreover, it fails to disclose that the version it advocates (Goodwill's) was disputed by the testimony of Goodwill's co-counsel Maloney, now a state court judge. Maloney was asked about Goodwill's testimony that he restrained Maloney from objecting to McDaniel's summation and that he did so for tactical reasons. Maloney denied it. J.A. 162. Rather, Maloney testified that he did object; that the first objection should have come at the time of White's improper expression of personal opinion (that is, long before Goodwill's alleged tactical decision to let McDaniel commit error); and that he did not object earlier solely because he "was not aware that it [the argument] was objectionable." J.A. 161-62. Indeed, Maloney disclaimed any

knowledge of Goodwill's tactical considerations.[6] Moreover, Maloney's habeas testimony flatly contradicted that of Goodwill with respect to other aspects of the trial.[7]

---

[6] It should be noted that Maloney's version is more consistent with the trial record than is Goodwill's. First, Goodwill testified that the alleged tactical decision was premised on his prior experience that, unrestrained by objection, McDaniel would exceed the bounds of permissible argument. But Maloney is correct that the first unethical comment came during White's portion of the summation. Second, Goodwill testified that he restrained Maloney from objecting at a point early in McDaniel's argument because he knew that McDaniel would end his argument as soon as the first objection came. J.A. 46-47. In fact, however, Goodwill himself objected early in McDaniel's argument, J.A. 16; McDaniel nevertheless continued for some time. J.A. 16-32.

[7] Maloney testified that there was a one day continuance during the original trial that was necessary because Goodwill returned from drinking at 4 A.M. "obviously intoxicated." J.A. 164. Maloney attempted to awaken Goodwill at 7 A.M., but Goodwill did not appear for trial. At a conference in chambers, the trial judge "asked Mr. McDaniel, who is a good friend of Mr. Goodwill if Mr. Goodwill could function under those circumstances. Mr. McDaniel said no, no, he couldn't." J.A. 165. On that basis, the trial judge

In sum, the state is asking the Court to take the unprecedented step of resolving a credibility issue in the first instance, in the face of the state's failure to prevail on this point in any of the courts below. On the basis of this uncredited, controverted testimony, it asks the Court to decline to reach the merits -- a position that no court below, including the Florida Supreme Court, was willing to accept.

CONCLUSION

For the foregoing reasons, the Court should reach the merits of petitioner's claims and reverse the judgment of the court of appeals.

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granted a continuance.

Goodwill admitted drinking the night before, but claimed that he did not appear in court because he was suffering from a migraine headache. Supp. J.A. 39.

Respectfully submitted,

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SEP 13 '73

Classification	SHERIFF'S OFFICE REPORT OF HOMICIDES, ASSAULTS, OR MISCELLANEOUS INJURIES MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	File Number
MURDER		209313

Name: James Carl Thomas DOB: 3-1-18	Address: 682-5232 Telephone: 1070 Dev Tenna Blvd., Lakeland
Color-Sex: W/M | Age: 54 | Occupation:	Where Employed: Self Employed Telephone:
Description of Injury and How Wounded: shot in the area of the head	Condition: Deceased, 9-8-73, 11:00 P.M.
Location Committed: Carl's Furniture & Refinishing, 1070 Dev Tenna Blvd., Lakeland, Fla.	Date and Time Committed: 9-8-73, about 6:00 P.M. OR A
Injured Found At: Scene	Found by Whom and Address: Little after D/T Dev Koehler, Hall of Justice
Injured Taken To: Lakeland General Hospital, Lakeland, Fla.	Date and Time: 9-8-73, 6:40 P.M.
Taken By: Imperial Ambulance	Address: Gary Road
Attended By: Emergency Room Personnel	Address: Lakeland General Hospital
Weapon Used: Possible .22 cal.	Where Found:
Weapon Found By:	Address:
Weapon Turned Over To:	Date and Time:
Autopsy By:	Coroner's Doctor:

Suspect, Or Committed By	Color-Sex	Age	Height	Weight	Hair	Eyes	Comp.
Willie Jasper Carden	C/M						

Remarks: Additional Suspects, Cars, Guns, Tattoos, Accomplices, Clothes, Clothing, Etc.

Cross References: 209313, 209307 and 209306.

Call Received From: Officers	How	Date	Time	Car Number	Time Arrived
Dev Koehler	Radio	9-8-73	1831	104	1834
Investigating Officer		Date and Time Assigned			
Lts. Jon Hall					

SHERIFF'S FORM NO. 11

Name Of Witness	Address	Employed By
Mrs. Edith Hill	3048 New Tampa Hwy. Lakeland	Housewife
Mrs. Helen Turman (48) 8-11-28	3070 New Tampa Hwy. Lakeland, Fla.	

Prior Record—	Case Number	Date	Arresting Officers

Personal Property On Body Or Possession Of

DETAILED REPORT—Give complete report, including name and address of each witness as to occurrence, in a chron[illegible] order, beginning with the complaint and ending with the arrest. Include all facts and circumstances which may be necessary to prove the case in court. Report should be complete in itself—do not refer to other reports. Use separate paragraphs for each person interviewed. Number each page of report. Sign your name at end of report.

Mrs. Turman was in her and her husband, James', furniture store, which is located in front of their home at 3070 New Tampa Hwy.; at or about 6:00 p.m., Mr. James Carl Turman, left to go to the house to the south of the store. This left Mrs. Helen Turman alone. She went to the back door, south side of store. As Mrs. Turman turned to go back into the store, she found a colored man standing in the hallway. Mrs. Turman stated she could not remember what the subject looked like or what he was wearing. The subject informed Mrs. Turman that he wanted to buy about $600.00 worth of furniture. Mrs. Turman started to show the subject around the store. They went into what they called the storeroom. At this time, the subject had a gun in his left hand, took Mrs. Turman by the right arm. He was behind her at this time. She turned to her left some and saw a gun in his hand. The subject said at this time, 'do as I tell you and you won't get hurt.' The

(Name Person Interviewed, Initials Either To This Report) (Signature Of Officer)

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.
MURDER		209315

subject went with Mrs. Turman in tow to the front of the store, northside. Here, the subject closed the overhead door; Mrs. Turman stated the sliding glass door had been closed and locked. Subject must have closed and locked it when he entered. Subject then brought Mrs. Turman to office part of store. Here, the subject or Mrs. Turman opened the cash register and remove the bills from it. Mrs. Turman stated there were about fifteen ones in the register. After subject removed the money again with Mrs. Turman in tow, walked her to the rear of the store, south. This is a small hallway to the rear door. When the subject got Mrs. Turman to this area where the mattress are located, told her to get on the floor. At this time, Mrs. Turman stated her husband, James, started to come in the rear door. At this time, the subject shot his gun once hitting James in some part of his face, states Mrs. Turman. The subject had Mrs. Turman get on the floor and attempted to put his hand under her dress. At this time, a young man living to the east of the Turman's came running up to the back door. This being a Phillip Arnold (he had worked for the Turman's). As he got to the rear door area, the subject Mrs. Turman stated shot the gun two times at Phillip. Mrs. Turman got off the floor at this time and saw Phillip run to the south down the driveway. The colored subject ran after Phillip. Mrs. Turman at this time left the rear door area to go to the phone and call for help. This being the telephone operator.

Mr. James Carl Turman was at the time Phillip arrived at the rear of the

Investigating Officer	Date

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.
MURDER		209313

store, laying outside the door on the grass.

A witness, Mrs. Edith Hill, stated she saw a subject leave the area in a green late model Chevrolet.

Mr. Turman pronounced dead at 11:00 p.m., 9-6-73, by Dr. J. R. Jackson, Admission Doctor, Lakeland General Hospital.

Sheriff's Form No. 106

Investigating Officers:	Date